02-1416

SUPREME COURT
STATE OF WISCONSIN

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

CERTIFICATION ACCEPTED FROM
COURT OF APPEALS, DISTRICT ONE, CASE NO. 02-1416

APPEAL FROM AN ORDER OF
THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE WILLIAM J. HAESE, PRESIDING
MILWAUKEE CIRCUIT COURT CASE NO. 01-CV-007770

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Wisconsin's public policy still require that the Firefighter's Rule remain viable?

   Trial Court's Answer: Yes.

   Court of Appeals' Answer: Not addressed.

2. If the "Firefighter's Rule" does remain viable, can it be reconciled with ***Polsky v. Levine,*** *73 Wis.2d 547, 243 N.W.2d 503 (1976),* where this Court abrogated the Doctrine of Implied Assumption of Risk?
Trial Court's Answer: Not addressed.
Court of Appeals' Answer: Not addressed.

3. Does expansion of the Firefighter's Rule to police officers violate the public policy set forth in ***Hass v. Chicago & Northwestern Railway,*** *48 Wis.2d 321, 179 N.W.2d 885 (1970)* and ***Pinter v. American Family Insurance Co.,*** *2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110,* given that officer with the Milwaukee Police Department ("MPD") are not specifically trained and experienced in rescue operations?
Trial Court's Answer: In the negative.
Court of Appeals' Answer: Certified.

4. Was the Trial Court's finding (i.e., that the training provided to Plaintiff-Appellant Julia Cole {"Officer Cole"} was sufficient to expand the Firefighter's Rule to police officers) clearly erroneous, given that it was not supported by the record?

Trial Court's Answer: Not addressed.

Court of Appeals' Answer: Not addressed.

5. Was the Trial Court's finding (i.e., that Officer Cole's personal on-the-job experience in capturing stray dogs was sufficient to expand the application of the Firefighter's Rule to police officers) clearly erroneous, given that it was not supported by the record?

Trial Court's Answer: Not addressed.

Court of Appeals' Answer: Not addressed.

6. If public policy requires expansion of the Firefighter's Rule to police officers, do Officer Cole's causes of action survive, given that they're based upon alleged violations of municipal ordinances and the defendants' failure to warn, as opposed to being based "solely" on the Defendants-Respondents' initial act of negligence?

Trial Court's Answer: No.

Court of Appeals' Answer: Certified.

STATEMENT OF THE CASE

A. Nature of the case.

This is an appeal from the Trial Court's grant of Summary Judgment in favor of the Defendants-Respondents, ***R-19,*** which expanded Wisconsin's "Firefighter's Rule" to a police officer with the Milwaukee Police Department ("MPD") who was mauled and seriously injured by a dog, ***R-16:14,18,*** owned by Defendants-Respondents Yvonne and Aubrey Hubanks, after the officer had happened upon the dog running at large. ***R-16:9,11.***

This case involves an analysis of the public policy underlying Wisconsin's Firefighter's Rule and, as a consequence, whether its scope should be expanded from what had been its recognized status as a limited exception to the general rule of negligence, immunizing landowners who negligently start a fire from liability to firefighters and, after ***Pinter*** immunizing drivers from liability to Emergency Medical Technicians ("EMT's") who respond to provide rescue operations, so as to encompass the occupation of a police officer.

This case also requires that the Firefighter's Rule, and its public policy underpinnings, be reconciled with ***Polsky,*** which had abrogated the Doctrine of Implied Assumption of Risk. ***Id.*** *at 551, 243 N.W.2d at 505.*

If this Court affirms the Trial Court's expansion of the Firefighter's Rule to police officers, it will then be necessary to address whether Officer Cole's causes of action should nonetheless survive, given that they're based on recognized exceptions to the Firefighter's Rule (i.e., failure to warn and violations of municipal ordinance).

B. Procedural history of the case.

Officer Cole filed this action on August 21, 2001. ***R-1.*** Defendants timely answered on September 10, 2001. ***R-2:1-4.*** A Scheduling Conference was held on October 4, 2001, ***R-3,*** which provided a Scheduling Order. ***R-4:1-2.*** Officer Cole filed an Amended Complaint on October 22, 2001, ***R-5,*** to which Defendants timely answered. ***R-7:1-3.***

Defendants filed their Notice of Motion and Motion For Summary Judgment, ***R-10,*** along with their Brief in Support, ***R-11,*** by letter of March 4, 2001. On March 19, 2001, Officer Cole filed her Brief in Opposition to Defendants' Motion for Summary Judgment, ***R-15,*** along with the supporting Affidavits of Bradley DeBraska, ***R-17,*** and Jonathan Cermele, ***R-16.*** Although a hearing on summary judgment was scheduled for April 24, 2002, ***R-20,*** the Trial Court issued its decision on April 12, 2002, ***R-19,*** without benefit of oral argument. On April 29, 2002, defendants filed their Notice

of Entry of Final Order. ***R-21.***

C. Statement of facts.

On January 8, 2001, Officer Cole was traveling in a MPD squad car proceeding westbound on Villard Avenue in the City of Milwaukee, at its intersection with 55th Street, when she saw a dog crossing Villard Avenue, ***R-16:9-10***, attached to a chain. ***R-16:7***. She was never dispatched to the scene, but simply happened upon the stray dog. ***R-16:9.***

By the time the squad car had come to a stop, the dog had crossed Villard Avenue and was walking slowly Northbound on 55th Street. ***R-16:10***. Officer Cole grabbed the chain with her left hand, using her right hand to beckon the dog closer; continually talking to the dog in a calm manner. ***R-16:12-14***. She tried at all times to be cautious so as not to scare the dog. ***R-16:14.***

Officer Cole estimated the dog to weigh 85-90 pounds. ***R-16:13***. It appeared calm and "happy"; walking slowly toward her and wagging its tail. ***R-16:12***. It did not appear vicious. ***R-16:14***. Officer Cole squatted down and let the dog sniff her hand. ***Id.***

Then, without warning or provocation, the dog lunged at Officer Cole's neck, knocking her to the ground and "latching on to [her] face." ***Id.*** Officer Cole was shocked.

Id. She had assumed the dog would have growled, barked or shown some aggressive posture if it was going to attack. ***R-16:15.*** Eventually, she was able to use her left hand to push the dog off her face. ***Id.*** She un-holstered her service weapon and aimed it at the dog in case it attacked a second time. ***R-16:*** *15-16.* However, the dog just sat there and stared at her. ***Id.*** At no time did the dog growl or give any indication it would attack. ***Id.*** The dog was not muzzled. ***R-19:****4.*

As a result of the attack, Officer Cole received three lacerations; one on the right earlobe, where "it was almost torn off"; one close to the right carotid artery, and; one just below the right jaw line. ***R-16:****17-18.* She was taken from the scene by ambulance to St. Michael's Hospital where she received thirty stitches to her face and ear. ***R-16:****17.*

ARGUMENT

Unfortunately, the concern voiced by the plaintiff in ***Pinter*** (i.e., that expanding the public policy set forth in ***Hass*** to EMT's would result in a flood of challenges to traditional negligence claims whenever a public employee is injured) has begun to come true. The fact that Officer Cole's case has come before this Court confirms that, regardless of this Court's assurances otherwise, ***Pinter*** *at ¶50,* at least a portion of the Wisconsin Bar does view ***Pinter*** as having expanded the public policy analysis underlying ***Hass***.

1. THE TRIAL COURT ERRONEOUSLY EXPANDED APPLICATION OF "THE FIREFIGHTER'S RULE" TO POLICE OFFICERS.

Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead to only one conclusion. ***Grams v. Boss,*** *97 Wis.2d. 332, 338, 294 N.W.2d 473, 477 (1980).* In this case, summary judgment was granted based upon ***Hass*** and ***Pinter,*** which had established a public policy limitation on the liability for firefighters and EMTs, respectively.

Whether public policy considerations preclude a particular cause of action is a question of law which this

Court determines independently as a matter of law. ***Pinter,*** *2000 WI 75 @ ¶13, 236 Wis.2d 137, 613 N.W.2d 110 (2000); also,* ***Hass,*** *48 Wis.2d 321 @ 326, 179 N.W.2d 885, 888 (1970).* However, the record in this case contains no factual basis to support the Trial Court's expansion of the Firefighter's Rule to police officers. Furthermore, such an expansion is at odds with the underlying basis for the policy found in ***Hass*** and ***Pinter.***

A. Origin of the Firefighter's Rule in Wisconsin.

The Firefighter's Rule was initially adopted in ***Hass*** as a result of a *volunteer* firefighter being injured when *responding* to a fire which was allegedly caused by the negligence of a railroad company. The plaintiff firefighter sued the railroad alleging general negligence, and the Court dismissed both claims, reasoning that the hazards of fire were apparent and the landowner had no duty to warn a firefighter. This Court stated:

> The hazard of fire feared by the landowner and for which he asks aid in fighting is the very reason for the summons to duty. The call to duty is the warning of the hazard; and even in the absence of a summons by the occupier of the land, the hazards of the fire are apparent . . . the duty of a landowner to a firefighter in respect to a warning of the hazard is satisfied by the very

nature of the call for assistance. ***Hass*** *at 324-325, 179 N.W.2d 885, 887. (emphasis added.)*

Hass then held that - based upon Wisconsin's traditional public policy analysis - one who negligently starts a fire can't be liable for that negligence when it causes injury to a firefighter responding to extinguish the blaze, because allowing such liability would: 1) place too great a burden on owners and occupiers of real estate, and; 2) enter a field that has no sensible or just stopping point. ***Hass*** *at 327, 179 N.W.2d 885, 888, citing* ***Colla v. Mandella****, 1 Wis.2d 594, 598-599, 85 N.W.2d 345, 348 (1957).*

B. Subsequent limitations to the application of the Firefighter's Rule.

Clark v. Corby*, 75 Wis.2d 292, 249 N.W.2d 567 (1977),* addressed the Firefighter's Rule, in terms of whether a landowner owes a duty to a firefighter injured while fighting a fire, where the injury is due to "special hazards." In ***Clark***, the plaintiff firefighter sued under three theories of liability: 1) common negligence for starting the fire; 2) negligence in failing to warn of known hidden-hazzards, and; 3) negligence for violating housing codes. The Court dismissed the negligence claim under ***Hass***, but allowed the others to proceed to trial, holding that:

- The Firefighter's Rule was not a bar to a claim of failure-to-warn, ***Id.*** *at 298, 294 N.W.2d 567, 570;*
- A homeowner has a duty to warn a firefighter of hidden hazzards known to the homeowner but not the firefighter, where the homeowner had the opportunity to warn, ***Id.***, and;
- The Rule was not a bar to a negligence claim based upon a municipal code violation, if the plaintiff could prove at trial that he was within the scope of protection of the ordinances allegedly violated. ***Id.*** *at 300, 294 N.W.2d 567, 571-572.*

Wright v. Coleman, *148 Wis.2d 897,436 N.W.2d 884 (1989),* addressed the Rule in terms of whether a defendant had a duty to warn of known hazards, as opposed to the "hidden" hazards in ***Clark.*** In ***Wright,*** the plaintiff firefighter was injured after slipping on ice at a fire scene. This Court determined that the homeowner had a duty to warn of known hazzards and would be negligent for failure to warn if, under the circumstances, it would have been reasonable to do so. ***Id.*** *at 907, 436 N.W.2d 864,868.* As a result of both ***Clark*** and ***Wright,*** the Firefighter's Rule therefore does not bar to a claim based upon failure to warn.

Hauboldt v. Union Carbide, *160 Wis.2d 662, 467 N.W.2d*

508 (1991), addressed the Firefighter's Rule in terms of whether a firefighter could proceed against a 3rd party for injuries sustained in the course of a fire. There, the plaintiff firefighter was injured by the unexpected explosion of a defective acetylene tank, as opposed to the fire itself or structural damage incidentally resulting from the explosion. ***Hauboldt*** held that, if a firefighter didn't have an opportunity to prepare for the danger which caused his injury, and the danger was not apparent or anticipated, a cause of action based upon injuries resulting from an intervening event can proceed to trial. ***Id.*** *at 667, 467 N.W.2d 508, 509.*

However, ***Hauboldt*** is also significant in that it clarified the general holding in ***Hass;*** that the Firefighter's Rule was "nothing more than a limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread." ***Hauboldt*** *@ 673, 467 N.W.2d 508, 512. (emphasis added.)*

C. *Pinter v. American Family Insurance Co.*, and the policy behind expansion of the Firefighter's Rule to Emergency Medical Technicians.

In this Court's most recent foray into the Firefighter's Rule, it recognized that ***Hass*** barred a cause of action *only when the sole negligent act was the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency*. ***Pinter,*** *2000 WI 75 @ ¶ 31, 236 Wis.2d 137, 613 N.W.2d 110.* Nevertheless, ***Pinter*** extended the Firefighter's Rule beyond its historical limitations, applying it to an EMT who was *dispatched* to the scene of a motor vehicle accident and injured while attempting to rescue a motorist.

i. *Pinter* required specialized training and experience in rescue operations in order to expand application of the Firefighter's Rule.

Pinter's expansion of the Firefighter's Rule to encompass EMT's was due to the extraordinarily similar professions of firefighter and EMT; both were specifically trained for, and had as their sole or major function, life saving and rescuing. ***Id.*** *at ¶43-44, 236 Wis.2d 137, 613 N.W.2d 110.* The Court stated:

> . . . ***Firefighting and emergency medical assistance are closely related professions;*** like Pinter, some EMT's also serve as firefighters. ***Members of both professions have special training and experience that prepare them to provide assistance under dangerous and emergency conditions.*** Persons entering either profession know that they will be expected to provide aid and protection to others in these hazardous circumstances. ***In short, both firefighters and EMT's are professional rescuers who are specifically trained and employed to conduct rescue operations in dangerous emergencies.*** *Id. @ ¶43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added.)*
>
> ***The facts of Pinter's case illustrate this point. Pinter had helped to extricate injured individuals from automobiles on over two hundred occasions.*** Pinter's injury occurred because he was required to maintain an awkward position for an extended period of time to avoid aggravating the passenger's spinal injuries. ***Thus, because of his position as a specially trained, experienced EMT, Pinter was asked to put himself in harm's way for the protection of another, more seriously endangered individual.*** *Id. @ ¶44, 236 Wis.2d 137, 613 N.W.2d 110.(emphasis added.)*

ii. The Court of Appeals has recognized the significance of *Pinter's* reliance on specialized training and experience in rescue operations.

Following ***Pinter***, the Court of Appeals addressed the application of the Firefighter's Rule in ***Mullen v. Cedar***

River Lumbar Co., *246 Wis.2d 524, 630 N.W.2d 574 (Ct.App. 2001)*. There, the issue was whether a superintendent of public works, injured when responding to an oil spill, could maintain a cause of action against the company which had dumped the oil. Defendants sought to apply the Firefighter's Rule under ***Hass*** and ***Pinter***, arguing that the plaintiff, as superintendent of public works, had special knowledge and experience in oil spills and was called to the scene specifically because of his knowledge and experience.

However, ***Mullen*** distinguished ***Hass*** and ***Pinter*** by finding that, unlike a superintendent of public works, EMT's and firefighters were professional rescuers specifically trained and employed to conduct rescue operations in dangerous emergencies. The Court stated:

> Although the superintendent had experience and some training in responding to fuel oil spills, it is undisputed that responding to spills constitutes only a small part of Mullen's job. He is also responsible for garbage removal, the recycling program, road maintenance and snow removal. ***Id.*** *@ ¶15, 630 N.W.2d 574 (Ct.App. 2001).*
>
> Given Mullen's limited duties . . . and the infrequency of spills to which he responds, we are unpersuaded that Mullen's role is sufficiently similar to the role of firefighters and EMT's to justify extending the firefighter's rule to include Mullen. ***Unlike firefighters and EMT's, Mullen is not a professional***

> ***rescuer who is "specially trained and employed to conduct rescue operations."*** *Id. @ ¶16, 630 N.W.2d 574 (Ct.App. 2001), citing* ***Pinter*** *2000 WI 75 @ ¶ 43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added.)*

2. EXPANSION OF THE FIREFIGHTER'S RULE TO POLICE OFFICERS WOULD BE AT ODDS WITH THE PUBLIC POLICY SET FORTH IN *HASS* AND REITERATED IN *PINTER*.

In ***Hass***, this Court found that the duty of a landowner to a firefighter was satisfied by the very nature of the call, reasoning that allowing a firefighter injured while fighting a fire to sue would simply place an unreasonable burden on the negligent fire starter. ***Id.*** *at 327.*

The premise behind that policy was, most reasonably, to permit individuals who require emergency assistance as a result of starting or failing to curtail a fire, to summon aid without having to pause and consider whether they might be liable for their negligent act(s).

For example, if a negligent fire-starter is concerned that he may be liable for damages to those who respond to fight the fire, he might either delay or completely refrain from alerting authorities of the fire's existence. Public policy, as represented by society's best interest, is obviously in favor of extinguishing fires as soon as possible. Any interference with that greater good must be at odds with public policy. The underlying principle behind

the policy set forth in ***Hass*** must, therefore, have been to ensure that tort law not interfere with the greater social good of rapid fire suppression.

Pinter applied the Firefighter's Rule to EMT's because the policy set forth in ***Hass*** readily translates to and encompasses that profession. Application of the public policy underlying ***Hass*** to EMT's is understandable; if one who negligently causes an automobile collision is concerned about liability to those who respond to render medical care, the negligent driver may delay or completely refrain from calling for medical assistance. As the greater social good requires not placing anything in the path of a negligent motorist summoning medical assistance for himself or others, ***Pinter*** followed ***Hass*** and held that allowing EMT's to recover damages against a driver whose negligence was the *sole cause* of the emergency response, would place an unreasonable burden on drivers who negligently cause collisions. ***Pinter*** *at ¶47, citing* ***Hass****, 48 Wis.2d at 327, 179 N.W.2d 885.*

However, as the primary function of police officers is that of law enforcement, as opposed to the type of rescue operations conducted by firefighters and EMT's, ***See Plaintiff-Appellant's Appendix ("P-A.App."), 182-184,*** the principle behind the public policy pronouncements of ***Hass*** and ***Pinter*** doesn't translate to police officers.

A. *Pinter's* expansion of the Firefighter's Rule to EMT's was based on the similarity between the two professions in terms of rescue operations.

Defendants incorrectly argue for expansion of the Firefighter's Rule to police officers because, in applying it to EMT's, they claim that ***Pinter's*** focus was on how EMT's and firefighters alike, were both "trained to confront danger." ***Defendants-Respondents' Brief to the Court of Appeals ("Defendants' Brief")*** *at 2.*

While ***Pinter*** did compare an EMT's job to that of a firefighter by classifying both occupations as "professional rescuers" trained to confront danger, ***Pinter*** *at ¶43,* the basis for ***Pinter*** expanding ***Hass*** to EMT's was clear; their common involvement in "rescue" operations. As ***Pinter*** stated:

> This series of cases shows that the public policy limitation in ***Hass*** is so limited that it applies in few cases. ***It bars a cause of action only when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency*** . . . [b]ased on this precedent, we agree with Pinter that the rule in ***Hass*** is a narrow limitation on liability. ***Pinter*** *at ¶31. (emphasis added.)*

Nevertheless, Defendants-Respondents maintain the Firefighter's Rule applies to those "in a position where they are trained to confront danger," ***Defendants' Brief*** *at*

2, as opposed to trained professional rescuers.

Obviously, any involvement in "rescue operations" must, by necessity, encompass a "dangerous situation." However, ***Pinter's*** reference to the common function of firefighters and EMT's in confronting danger appears most reasonably related to the danger posed to others (i.e., loss of life and limb) *associated with the rescue operation itself*. ***See Pinter*** *@ ¶43.* For example, in comparing EMT's to firefighters, ***Pinter*** stated:

> In short, ***both EMT's and firefighters are professional rescuers who are specifically trained and employed to conduct rescue operations in dangerous emergencies***. *See* ***Maltman v. Sauer,*** *84 Wash.2d 975, 530 P.2d 254, 257 (1975)* (holding that a **professional rescuer may not recover damages** for an injury that is "the result of a hazard **generally recognized as being within the scope of dangers identified with the particular rescue operation**"). ***Id.*** *@ ¶43. (emphasis added.)*

Pinter's citation to ***Maltman*** was not by mistake. It strongly implies that this Court's reference to "danger" was meant to encompass the danger to a third party associated with the rescue itself.

The facts of ***Maltman*** are important. There, the Washington Supreme Court addressed the application of the "rescue doctrine" to non-voluntary rescuers. ***Maltman*** *at*

976-977, 530 P.2d 254, 256-257. The administrator of the estates of several active members of the United States Army who died in a helicopter crash *en route* to perform rescue operations as a result of an automobile accident, sued the negligent driver for wrongful death. ***Id.*** ***Maltman*** concluded that:

> [t]he proper test for determining a ***professional rescuer's right to recover*** . . . is whether the hazard ultimately responsible for causing the injury is inherent within the ambit of those dangers which are unique to and generally associated with the ***particular rescue activity*** . . . when the injury is the result of a hazard generally recognized as being within the scope of dangers identified with the ***particular rescue operation***, the doctrine will be unavailable . . . ***Id.*** *@ 979, 530 P.2d 254, 257. (emphasis added.)*

If, as asserted by Defendants-Respondents, an EMT's status as a "professional rescuer" was insignificant to ***Pinter's*** decision to expand the Firefighter's Rule to encompass EMT's, then why the citation to ***Maltman***?

Moreover, immediately following that citation, ***Pinter*** explained how the facts of that case (i.e., EMT Pinter's special training in rescue operations, extensive experience in extricating individuals from automobiles, and the fact that his job required him to be placed in harms way for

another *more seriously endangered individual*) supported application of the rule. ***Id.*** *@ ¶44.*

Again, if an EMT's status as a "professional rescuer" was not an essential factor in ***Pinter's*** decision to expand the Firefighter's Rule to EMT's, then why would this Court specifically reference EMT Pinter's training and extensive experience in rescuing injured motorists?

As recognized in ***Hass***, and reiterated in ***Pinter***, the Firefighter Rule:

> . . . bars a cause of action ***only*** when the sole negligent act is the same negligent act that ***necessitated rescue*** and ***therefore brought the firefighter to the scene of the emergency.*** ***Pinter,*** *2000 WI 75 @ ¶31, 236 Wis.2d 137, 613 N.W.2d 110, citing* ***Hass.*** *(emphasis added.)*

The public policy which allowed expansion of the Firefighter's Rule to EMT's was therefore limited to prohibiting a professional rescuer from recovering damages in tort, when the sole negligent act was the same act which resulted in the rescuer responding to the scene of rescue. ***See Pinter*** *at ¶¶31,50.*

The record in our case demonstrates that the main function of a police officer is the detection and prevention of crime, as well as the apprehension of criminals. ***P-***

A.App.183. While police may, in the course of their employment, *occasionally* enter into the "rescuer" mode, those situations are few and far between and certainly neither an officer's primary function, nor one for which an officer is specifically trained. ***Id.***

Our record is utterly void of any facts supporting the Trial Court's finding that: 1) police officers, like firefighters and EMTs, are ". . . professional rescuers specially trained and employed to conduct rescue operations in dangerous emergencies," ***P-A.App.105,*** and that; 2) "the job of a police officer is arguably even more similar to [that of] a firefighter than an EMT." ***Id.***

Moreover, a police officer's training - be it in the Police Safety Academy at the beginning of their career or thereafter - focuses on the prevention and detection of crime and the apprehension of criminals. ***R.16:4, P-App.183.*** The MPD provides absolutely no training on how to capture or handle stray dogs. ***R.16:4.*** Although some MPD squads are equipped with a "noose" capable of snaring a stray animal, Officer Cole's squad wasn't equipped with that device. ***R.16:4,7.*** Even if her squad had been so equipped, not only had Officer Cole never used the device herself, she had never seen anyone use it, ***R.16*** *@ 6,* and the MPD provides no training on how to use it. ***R.16:4*** *and* ***R-17:3.***

The bottom line is that Officer Cole had absolutely no professional training which would have prepared her for what she encountered. Nevertheless, in ruling against Officer Cole, the Trial Court found that "a police officer is specifically trained and required to provide aid and protection to others in hazardous circumstances and should anticipate dangerous situations." ***P-App.104.***

As police officers are neither firefighters, EMT's nor trained professional rescuers, ***P-A.App.182-184,*** expansion of the Firefighter's Rule to encompass all police officers would therefore be inconsistent with the public policy initially set forth in ***Hass*** and reiterated in ***Pinter.***

B. Application of the Firefighter's Rule to police officers would be at odds with prior decisions of this court which abrogated the doctrine of Implied Assumption of Risk.

Defendants-Respondents argue for expansion of the Firefighter's Rule, because police officers have been trained to confront danger. ***Defendants' Brief*** *at 2.* They claim that, because police officers have impliedly assumed the risks inherent with the dangers for which they've been trained, they cannot maintain a cause of action for injuries received while involved in such dangerous situations. ***Id.*** Unfortunately the trial court shared this opinion. ***P-A.App:104-105.***

Many jurisdictions applying the Firefighter's Rule to public safety officers such as police, have done so based upon the Doctrine of Implied Assumption of Risk. ***Pinter,*** *at ¶36; also,* ***62 Am.Jur.2d,*** *Premises Liability, ¶431.* However, almost thirty years ago this Court confirmed that "[c]onduct constituting an implied or tacit assumption of risk is no longer a bar to recovery for action for negligence." ***Polsky v. Levine,*** *73 Wis.2d 547, 551, 243 N.W.2d 503, 505 (1976).* ***Polsky*** stated that:

> In ***McConville v. State Farm Mutual Automobile Insurance Co.,*** *(1962), 15 Wis.2d 374, 384, 113 N.W.2d 14,* this court said the unreasonable assumption of risk constitutes negligence and should be compared to the negligence of the adverse party. **Where what was formerly denominated assumption of risk falls short of express consent to exposure to a particular hazard, it constitutes contributory negligence and is subject to the comparative negligence statute.** ***Polsky,*** *73 Wis.2d at 552, 243 N.W.2d at 505, citing to* ***Colson v. Rule,*** *15 Wis.2d 387, 395, 113 N.W.2d 21 (1962) (emphasis added.)*

While ***McConville*** and ***Colson*** were apparently limited to the relationships out of which they arose (i.e., host/guest and farm employer/employee), one year later the same principle was extended to all situations involving the tacit assumption of risk. In ***Gilson v. Drees Brothers,*** *19 Wis.2d*

252, 120 N.W.2d 63 (1963), this Court stated that:

> . . . greater fairness will result if the claimed negligence . . .is couched in terms of contributory negligence rather than in terms of assumption of risk. This will be true **whenever the alleged assumption of risk arises by implication . . . as opposed to an express assumption of a known risk. This will serve to extend the rule adopted in the McConville and Colson cases to all situations involving the tacit assumption of risk.** ***Id.****, 19 Wis.2d at 258, 120 N.W.2d at 67. (emphasis added.)*

As these cases demonstrate, assumption of risk can arise by either express or implied acceptance of the risk(s) associated with a particular action. Express assumption of risk occurs when the plaintiff has knowingly and voluntarily chosen to encounter the specific risk of harm posed by defendant's negligence (e.g., the good samaritan, knowing that a building is on fire, nevertheless enters the building in order to save the lives of those trapped inside). Since the widespread adoption of comparative negligence principles, this has been labeled as "secondary assumption of risk." ***63A Am.Jur.2d,*** *§1371, Primary and Secondary Assumption of Risk.*

Implied assumption of risk, on the other hand, occurs when the law implies acceptance of the risk associated with the particular action (e.g., a firefighter fighting a fire).

Where assumption of risk arises by implication, it does so as a result of a court defining the contours of what, if any, legal duty a particular class of defendants owe to an injured plaintiff. ***Id.*** With the advent of comparative negligence, implied assumption of risk has been labeled by some as "primary assumption of risk," ***Id.***, and corresponds to "assumption of risk type 2" as listed in the Restatement. ***Id.***

It is this theory which has, in a number of jurisdictions, served as the basis for application of the Firefighter's Rule to firefighters, ***63A Am.Jur.2d,*** *§1396, Firefighter's Rule, Generally,* as well as other employment relationships in areas of employment known to involve a particular risk. ***63A Am.Jur.2d,*** *§1371, fn.81. (citing* ***In re Air Crash Disaster at Detroit Metro Airport,*** *737 F.Supp 409 (E.D.Mich. 1989).*

In such jurisdictions, the question whether the defendant owed a duty to the plaintiff does not turn on the reasonableness of the plaintiff's conduct, but instead on the nature of the activity in which the defendant was engaged, and the relationships of the defendant and plaintiff to that activity. ***Knight v. Jewett,*** *3 Cal 4th 296, 309, 11 Cal. Rptr.2d 2,10, 834 P.2d 696, 704 (1992); also,* ***63A Am.Jur.2d,*** *§1371.*

Whether it is called "public policy" or "Primary Assumption of Risk," it would appear to be a distinction without a difference. Wisconsin created the Firefighter's Rule as a means to define the contours of the legal duty owed by negligent fire-starters and motorists to injured firefighter's and EMT's, respectively. This was done as a result of nature of the activity in which the particular defendant was engaged, and the relationships of that defendant and the injured plaintiff to that activity.

Given that Wisconsin has abrogated the Doctrine of Implied Assumption of Risk, this Court could, therefore, logically follow Oregon's lead and abolish the Firefighter's Rule as a matter of law. ***See Christiansen v. Murphy,*** *296 Or. 610, 678 P.2d 1210 (1979).*

Alternatively, this Court could maintain the viability of the Firefighter's Rule to the extent thus far applied (i.e., firefighters and EMT's) - while remaining consistent with both ***Polsky, et al.***, and the prior pronouncements of this Court as to the public policy underpinnings of the rule - and not expand its application to police officers, because:

* The public policy in ***Hass*** and ***Pinter,*** was premised on the social goal of prohibiting those involved in rescue operations from seeking damages from the person(s) who negligently caused the

need for rescue, so as to prevent tort law from interfering with a rapid rescue response, and;

* The aspect of confrontation of danger - and the corresponding Doctrines of Implied Assumption of Risk and/or Primary Assumption of Risk - were never the basis for application of the Firefighter's Rule in Wisconsin, outside the scope of its application to rescue operations.

C. The cases cited by Defendants-Respondents as supporting application of the Firefighter's Rule to police officers are neither on point, nor persuasive, as they're based upon the Doctrine of Implied Assumption of Risk, and not the public policy set forth in *Hass* and *Pinter*.

Defendants-Respondents cite ***Neighbarger v. Irwin Industries, Inc.*** *8 Cal.4th 532, 882 P.2d 347 (1994),* ***Hubbard v. Boelt,*** *28 Cal.3rd 480, 169 Cal.Rptr.706, 620 P.2d 156 (1980),* ***Martin v. Gaither,*** *219 Ga.App. 646, 466 S.E.2d 621 (1995) and* ***Krauth v. Geller,*** *31 N.J. 270, 157 A.2d 129 (1960),* for the proposition that the Firefighter's Rule should be applied to police officers. Their assertion is misplaced, as the principle underlying the Firefighter's Rule in each of those jurisdictions is the Doctrine of Implied Assumption of Risk. See ***Neighbarger,*** *8 Cal.4th 532, 882 P.2d 347, 351-352,* ***Hubbard,*** *28 Cal.3rd 480, 484, 620 P.2d 156, 158,* ***Martin,*** *219 Ga.App. 646, 466 S.E.2d 621, 622, and* ***Krauth,*** *31 N.J. 270, 157 A.2d 129, 130-131 (1960).*

However, this Court has consistently held that

Wisconsin's version of the Firefighter's Rule was never based upon assumption of risk, but judicial public policy. ***Pinter,*** *2000 WI 75, ¶¶35-36, 236 Wis.2d 137, 152-153, 613 N.W.2d 110.* As stated in ***Wright***:

> Where the negligence of the landowner was only 'in starting a fire and failing to curtail its spread' . . . ***as a matter of judicial public policy*** there should be no liability to a firefighter . . .
>
> ***Other jurisdictions have reached a similar conclusion . . . based upon a theory of assumption of risk -- a doctrine which is no longer recognized as per se a bar to liability in our negligence jurisprudence*** . . .
>
> This court, under the facts of ***Hass,*** *as a matter of policy* reached a result *consistent with* the "fireman's rule" . . . ***Wright*** *@ 904, 436 N.W.2d 864. (emphasis added.)*

Given the public policy premise of Wisconsin's version of the Firefighter's Rule - and assuming this Court wishes to remain true to its prior pronouncements consistent with that premise - ***Neighbarger, Hubbard, Martin and Krauth*** are neither on point, nor persuasive authority for expanding its application to police officers.

3. ADOPTION OF DEFENDANTS'-RESPONDENTS' READING OF THE FIREFIGHTER'S RULE, WOULD INEVITABLY RESULT IN ITS APPLICATION TO ANY INDIVIDUAL PROVIDING AID AND PROTECTION AND TRAINED TO CONFRONT DANGER; SURELY, NOT THE INTENDED PURPOSE BEHIND EITHER *HASS* OR *PINTER*.

A. Application to public sector employees who provide aid and protection and are trained to confront dangerous situations.

The logical consequence of this Court adopting the Defendants-Respondent's version of the Firefighter's Rule (i.e., where the Rule would bar a negligence action brought by individuals who provide aid and protection, are trained to confront dangerous situations, and are injured while doing so), would lead to the following results, none of which were likely contemplated by either ***Hass*** or ***Pinter***:

* A high-profile member of a local Emergency Management Preparedness Team who suffers a heart attack after opening a package addressed to him and containing what he believed to be a bomb, being prohibited from suing the postal service for failure to adequately detect the device prior to delivery;

* A Department of Natural Resources ("DNR") warden being prevented from suing for injury caused by gunshot wounds resulting from the negligent actions of a hunter with whom the warden came in contact;

* A Milwaukee Public School safety official (i.e., security guard) being prohibited from suing based upon injuries sustained due to the negligence of unruly students;

* A Milwaukee Public School teacher being prohibited from suing for injury resulting from the negligent actions of a known "ruffian;"

* A building inspector being prevented from suing a landowner for negligently failing to properly maintain a building, when the inspector is injured after falling through a rotten floor while performing an inspection;

* A State or Federal safety inspector being prevented from suing the Milwaukee Metropolitan Sewerage District ("MMSD") for injuries received while inspecting the "Big Tunnel," as a result of the MMSD's negligence in maintaining the Tunnel.

B. Application to private sector employees who provide aid and protection and are trained to confront dangerous situations.

Significantly, nowhere in either ***Hass*** or ***Pinter*** is there any reference to the Firefighter's Rule being limited to public employees. In fact, ***Hass*** involved a *volunteer firefighter*, as opposed to a public employee. ***Hass**, at 322, 179 N.W.2d 885, 886.*

Application of the Firefighter's Rule to police officers simply because "they are in a position where they are trained to confront danger," ***Defendants' Brief** at 2,* would also result in the Rule's inevitable application to *any individual* providing aid and protection, who is trained to "confront danger." This would include security guards, emergency room personnel, highway workers (whose jobs

regularly subject them to significant danger at the hands of the public) and, given the unfortunate current state of our metropolitan public schools, even school teachers and administrators. Such a slippery slope cannot have been envisioned by ***Hass***, nor intended by ***Pinter***.

Because the policy considerations behind ***Hass*** and ***Pinter*** similarly do not limit themselves to public servants, if this Court adopts the Defendants'-Respondents' reading of the Firefighter's Rule, the flood gates will open for the use of affirmative defenses in all sorts of heretofore unimaginable cases. In time, the following scenarios would likely filter their way through the system, eventually finding their way to this Court:

* The estate of an airline pilot - trained and armed in light of the events of 9/11 - being prevented from bringing a wrongful death action under the Federal Tort Claims Act, against the airport security organization for failing to detect that the passenger who shot the pilot was, in fact, armed;

* A department store security guard being prevented from suing the driver of a vehicle who runs him over in his employer's parking lot, while the security guard attempts to investigate whether the driver had stolen items from his employer's shelves;

* A pregnant emergency room nurse being prohibited from suing the HIV positive patient who, while intoxicated and/or under the influence of drugs, spits in

the nurse's eye and thereby infects her and her unborn child with HIV;

* A security guard employed by a firearms dealer, being prevented from suing a customer for injuries sustained as a result of the customer's negligently discharging the weapon in the store;

* A "charter school" administrator being prevented from suing based upon injuries sustained at the hands of unruly students, when the administrator attempts to control those students;

* The estate of an independent contractor of the electrical company who is electrocuted while attempting to re-establish electrical service during a severe storm, being prevented from suing the electric company for failing to ensure proper maintenance of an electric transformer.

As these examples demonstrate, expanding the Firefighter's Rule to police officers according to Defendants'-Respondents' rationale, would "enter a field that has no sensible or just stopping point." ***Hass*** *@ 327, 179 N.W.2d 885, 888, citing* ***Colla*** *at 598, 85 N.W.2d 345, 348.* Certainly, public policy does not favor such a result.

While in their Brief to the Court of Appeals, Defendants-Respondents argued that "expansion of the rule to police officers would have no effect on a claim brought by a school safety officer, teacher or emergency room doctor or nurse," ***Defendants' Brief*** *at 10,* they never explained why. Rather, they simply claim to seek only to apply the

Firefighter's Rule to police officers "under limited circumstances, and [are] not asking for a blanket exception to be carved out for any individuals who may be faced with a dangerous situation while in the course of their employment." ***Id.*** *at 10-11.*

However, as the only rationale supporting extension of the Firefighter's Rule to police officers would be to do so based on a public policy requiring its application to ***any*** individuals who, by reason of their employment provide aid and protection and are trained to confront dangerous situations, such a "blanket exception" to the general rule of negligence would necessarily arise.

The real question is whether public policy should now require that all such persons - simply because of their employment relationship and the type of situation in which they might reasonably find themselves - be barred from bringing a cause of action in negligence, as opposed to having their claim(s) heard by a finder of fact.

4. Even if this Court does expand the Firefighter's Rule to police officers, Officer Cole's claims survive under recognized exceptions to the rule.

The facts of this case can be distinguished from both ***Hass*** and ***Pinter*** on three grounds.

A. Officer Cole alleges causes of action based on facts other than Defendants-Respondents' initial negligent act.

Officer Cole alleges causes of action based on facts *other than* the Hubanks' initial negligent act (i.e., failure to warn and violations of the Milwaukee Code of Ordinances). Unfortunately, the Trial Court judged the applicability of the municipal ordinance exception to the Firefighter's Rule incorrectly, ruling that Officer Cole's claims couldn't survive because the ordinances weren't "specifically enacted to protect police officers from injury." ***P-A.App.*** *at 103.*

The actual standard, however, allows a claim of a municipal violation causally related to a plaintiff's injury to survive a motion for summary judgment, as long as "it can be shown *at trial* that the [plaintiff] is within the scope of protection of the ordinances allegedly violated . . . ." ***Clark,*** *at 302. (emphasis added.)*

The Trial Court also incorrectly analogized ***Pinter's*** rejection of the use of the motor vehicle code as an exception to the Firefighter's Rule, to the municipal ordinances cited by Officer Cole. However, there's a significant difference between the motor vehicle code which EMT Pinter *attempted* to utilize, and the ordinances Officer Cole *has* utilized.

Unlike in ***Clark,*** EMT Pinter did NOT plead the

application of a specific ordinance or statute. ***Pinter*** *@ ¶¶46,50.* Rather, he merely "suggested" that the motor vehicle codes generally prohibiting negligent driving, should be classified as an exception to the Rule. ***Id.*** *@ §46.* In rejecting that "suggestion," the Court was clear:

> [t]he injury that Pinter sustained is simply too remote from the initial acts of negligence that caused the collision. Permitting Pinter's action to proceed would enter a field with no sensible or just stopping point. ***Id.*** *at ¶47.*

Pinter therefore recognized that a plaintiff would not fall within the scope of protection offered by a municipal ordinance, where the purpose of the ordinance has nothing to do with protecting the plaintiff.

However, the municipal ordinance violations alleged in Officer Cole's Amended Complaint are different. While the motor vehicle codes are meant to protect the driving public and pedestrians from negligent motorists, the municipal codes used by Officer Cole are meant to protect the public - as a whole - from dangerous animals. ***P.App.*** *at 162-174.* Officer Cole remains a member of the public, regardless of her acting in her capacity as a police officer at the time of injury. All causes of action specifically referencing a municipal violation must therefore survive under ***Clark.***

Similarly, all of Officer Cole's causes of action based upon the Hubank's failure to warn survive under ***Clark*** and ***Wright***. ***Clark***, *@ 299-300, 249 N.W.2d 567, 571;* ***Wright*** *@ 907, 436 N.W.2d 864, 868.* Interestingly, Defendants'-Respondents' argument otherwise to the Court of Appeals, was limited to: 1) their having no ability to warn, and; 2) the apparent danger of a loose dog. ***Defendants' Brief*** *at 14-15.*

However, as it is only the unusual or very clear case where a court may conclude that, despite negligent conduct, there shall be no recovery as a matter of law, ***Wright*** *at 908, 436 N.W.2d 864, 868-869,* both such "defenses" would appear to be issues best left to a jury.

B. Officer Cole was not involved in any type of "rescue operation" at the time of her injury.

Although rescue has been a significant aspect of all of the Wisconsin cases addressing the Firefighter's Rule, the record unequivocally establishes that Officer Cole was not involved in any type of rescue operation at the time of her injury.

The record also demonstrates that the main function of police officers is the detection and prevention of crime, as well as the apprehension of criminals, and <u>not</u> rescue operations. ***P-A.App.183.*** With little or no "rescue"

activities as a function of the job, an no "rescue" operations at the time of injury, application of the Firefighter's Rule to police officers would constitute a considerable expansion of the scope and purpose of the Firefighter's Rule.

C. There was simply no "emergency" associated with Officer Cole's taking police action.

Wisconsin's version of the Firefighter's Rule is unique, and requires the existence of an emergency. Likewise, Missouri's version of the Firefighter's Rule also requires an emergency, ***Gray v. Russell,*** *853 S.W.2d 928, 931 (Mo.banc 1993),* and the Missouri courts have recognized that, where no emergency exists, the Firefighter's Rule is <u>not</u> applicable. ***Id.***

Ours is not a case where a police officer was either dispatched or responded to the scene of an emergency. Rather, while on routine patrol Officer Cole happened upon a stray dog and, as a result, took police action. No people were in immediate danger, and no one was hurt other than Officer Cole. As such, even if the Firefighter's Rule should be expanded to police officers, it shouldn't apply in this case.

CONCLUSION

For all the above-stated reasons, Officer Cole respectfully requests that this Court reverse the Trial Court's grant of summary judgment in favor of Defendants-Respondents because - as public policy is not furthered by expanding the Firefighter's Rule to include police officers - Defendants-Respondents are not entitled to judgment as a matter of law.

In the event this Court finds it appropriate to expand the Firefighter's Rule to police officers, Officer Cole would request this Court reverse the Trial Court's decision granting summary judgment, and allow all claims to proceed to trial, given that all of her claims fit within recognized exceptions to the Firefighter's Rule under ***Clark*** and ***Wright***.

Dated this 21st day of May, 2003.

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)and(c), Stats., for a brief and appendix produced with a monospaced font. The length of this brief is 39 pages.

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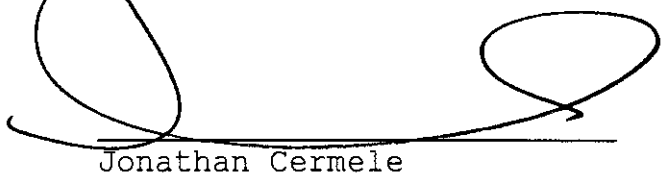

Jonathan Cermele
State Bar No.: 1020228

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COPY

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

and

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

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EGGERT & CERMELE, S.C.

Case No. 01CV007770

FILED
22 APR 12 2002 22
JOHN BARRETT
Clerk of Circuit Court

DECISION AND ORDER

INTRODUCTION

This case arises out of a police officer's claim for injuries received while attempting to retrieve a stray dog. Plaintiff Officer Julia Cole came upon a dog running loose while she was on patrol on January 8, 2001. The dog was running in the street dragging a leash behind it. Officer Cole stopped and tried to retrieve the dog by grabbing the leash and coaxing the dog forward. As Officer Cole attempted to persuade the dog, the dog unexpectedly lunged at her, biting her in the face and neck. Plaintiff filed a lawsuit in an attempt to recover damages for injuries sustained in the attack. The suit accuses the owners of the dog of negligently caring for and restraining the dog, harboring a dangerous animal, failing to confine and muzzle the dog, and failing to warn the public of the known dangerous nature of the dog. Defendants filed a Motion for Summary Judgment on March 4, 2002 requesting that Plaintiff's claim be dismissed pursuant to the "firefighter's rule." Plaintiff filed a Brief in Opposition to Defendant's Motion for Summary Judgment on March 19, 2002.

ANALYSIS

Wisconsin Statute §802.08(2) provides that a party is entitled to summary judgment:

> [i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead to only one conclusion. Beyak v. North Central Food Systems, Inc., 215 Wis.2d 64 (Ct. App. 1997). A "material fact" is one that is of consequence to the merits of the litigation. Sherry v. Salvo, 205 Wis.2d 14 (Ct. App. 1996). A factual issue is "genuine" if the evidence is such that a reasonable juror could return a verdict for the nonmoving party. Kenefick v. Hitchcock, 187 Wis.2d 218 (Ct. App. 1994). Summary judgment must be granted where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Jackson v. Benson, 218 Wis. 835 (1998).

The "firefighter's rule" was first used in Wisconsin in Hass v. Chicago & North Western Railway which recognized a limitation on liability in a firefighter's negligence action. 48 Wis.2d 321, 179 N.W.2d 885 (1970). That case held that "one who negligently starts a fire is not liable for that negligence when it causes injury to a firefighter who comes to extinguish the blaze." Id. at 327. The Hass rule was modified slightly in 1977 in Clark v. Corby. 75 Wis.2d 292, 249 N.W.2d 567 (1977). Though affirming the basic public policy of Hass, Clark determined that a firefighter could pursue a cause of action based on additional acts of negligence other than the initial negligence that caused the fire. Id. In that case, the Court allowed causes of action based on failure to warn about hidden special dangers and violation of the housing code to proceed. Id. The action based on violation of the housing ordinance was allowed to proceed only if the plaintiff could establish that the ordinance was specifically enacted to protect the firefighter. Id.

Wright v. Coleman next examined the firefighter's rule and clarified that Hass only precludes a negligence action when it is based on the initial act of negligence that caused the fire and necessitated the rescue. 148 Wis.2d 897, 904, 436 N.W.2d 864 (1989). In that case, the firefighter was injured when he slipped and fell on the defendant's icy driveway. Id. The court determined that liability might exist if under the circumstances, a reasonable person would have warned the firefighter about the ice. Id. In the next case to consider the "firefighter's rule," Hauboldt v. Union Carbide Corp. applied Hass and found that the public policy considerations barring recovery in that case do not bar a cause of action that is based on an independent act of negligence. 160 Wis.2d 662, 467 N.W.2d 508 (1991). In Hauboldt, a firefighter's claim against a manufacturer whose defective product directly caused injury to the firefighter during the course of a fire, when the defective product was not reasonably apparent or the risk anticipated, was not barred. Id. The "firefighter's rule" was extended most recently in Pinter v. American Family Mutual Insurance Company to bar recovery in a case in which an emergency medical technician (EMT) sustained injuries while performing his duties. 236 Wis.2d 137, 613 N.W.2d 110 (2000). The court first reaffirmed the public policy considerations in Hass and then went on to liken emergency medical technicians to firefighters, noting that both are members of professions in which they receive special training and

experience to prepare them to provide assistance under dangerous emergency situations. Id. In Pinter, the court addressed an argument that because the negligent driver violated the motor vehicle code, a separate basis of recovery had been established. Id. The court rejected that argument citing Clark for the proposition that the protection of an ordinance is extended only to those whom the enactment was intended to protect, finding that the motor vehicle code is not designed to protect rescuers in the performance of their duties. Id. Interestingly, the court concluded that had the plaintiff sought recovery on the basis of some act other than the initial negligence that necessitated emergency medical assistance, plaintiff's claim would not have been barred. Id.

Defendant contends that Plaintiff cannot maintain a cause of action against the Defendants based on the firefighter's rule. Defendants argue that the negligence complained of in her complaint is the cause of Plaintiff's injuries and her claim is therefore barred. Defendants state that Plaintiff's occupation specially prepares her to provide protection to others in hazardous situations and that she therefore falls in the same category as firefighters.

Plaintiff argues that this case is distinguishable from those cases under the firefighter's rule. Plaintiff points to the fact that here the officer had not been called and was not "responding" to the scene of the stray dog, like the firefighters and EMT in the firefighter's rule cases. In addition, Plaintiff argues that the Defendants violated statutes requiring them to restrain their dog, and that therefore, there is an act of intervening negligence and the firefighter's rule cannot bar recovery. In addition, Plaintiff asserts that Officer Cole's main function was not to capture stray dogs, and she was not trained or prepared to handle dogs. Finally, Plaintiff argues that Defendants had a duty to warn the public of the dangerous propensity of the dog and failed in that duty by failing to warn by placing a muzzle on the dog or otherwise.

Pursuant to Clark, here any violation of ordinance by the Plaintiffs' failure to restrain their dog and by the dog's biting of the officer, is not violation of a statute specifically enacted to protect police officers from injury. Such a statute is arguably enacted to protect the public in general (and to punish dog owners) but in her capacity as a police officer, Plaintiff undertakes such jobs as encountering stray animals that are potentially dangerous. See also Pinter at 157 (finding that negligence through violation of motor vehicle statutes did not state a claim as the statute was not designed to protect EMT's from injury); Clark at 299-300 (finding that a firefighter's claim based on a housing code violation could proceed provided that the plaintiff was able to establish that the ordinance was enacted to protect a firefighter in the performance of his or her duties). In Pinter, the court found that violation of the motor vehicle code was not meant to protect EMT's, although motor vehicle statutes are arguably meant to protect the public's safety and an EMT is certainly a member of the public. Here, although the ordinance requiring restraint of dogs is similarly meant to protect the public and police officers are members of the public, Plaintiff's action does not survive for the same reasons that Pinter's action did not. The ordinance requiring restraint of dogs was not designed to protect police officers in the performance of their duties just as the motor vehicle code was not designed to protect EMT's in the performance of their duties. Accordingly, the

Court does not accept Plaintiff's argument that her action survives due to this ordinance violation.

Under Wright, which held that a negligence action is precluded only when it is based on the initial act of negligence that caused the fire and necessitated the rescue, Plaintiff's action is similarly precluded. The Court is not persuaded by Plaintiff's attempt to distinguish this case because the officer was not actually responding to an emergency call, but was attempting to subdue a dog on her own initiative. Here, Officer Cole was "responding" to the very negligence that caused her injury. The fact that the dog had not been restrained and was running loose, is one of the bases of negligence that Plaintiff relies upon in her complaint. Plaintiff's actions therefore resulted from the initial acts of negligence that caused the dog to be roaming free and necessitated the rescue/restraint of the dog.

Further, pursuant to Hauboldt, although not a case of a defective product, the Plaintiff cannot claim that the fact that the dog was dangerous was not reasonably apparent or the risk anticipated. Plaintiff argues that her causes of action based on failure to warn survive because Defendants had the opportunity and failed to warn (by muzzling the dog) of the hidden hazard of their dog's propensity to attack without provocation. To the contrary, the Court finds that even if the dog had been muzzled and even accepting Plaintiff's description of it's "calm" appearance, Plaintiff, especially in her capacity as a police officer trained to deal with dangerous situations, should have realized that the dog was possibly dangerous and anticipated this risk. Officer Cole chose to catch the Defendants' dog as part of her duties. Plaintiff should have been aware of the possibility that any dog could be dangerous despite its outward appearance or lack of muzzle.

Finally, applying Pinter to this case and despite Plaintiff's contention that she does not have sufficient training that would have prepared her to capture or handle a stray dog (as the main function of a police officer is detection and prevention of crime and not "rescue") the Court finds that the job of a police officer is similar to both a firefighter and an emergency medical technician. As is true with a firefighter and EMT, a police officer is specially trained and required to provide aid and protection to others in hazardous circumstances and should anticipate dangerous situations. See Pinter at 157 (concluding that "EMT's, like firefighters, are specially employed and trained to confront danger"); Neighbarger v. Irwin Industries, Inc., 8 Cal. 4th 532, 882 P.2d 347 (1994)(finding that the public hires, trains and compensates public firefighters and police officers to confront danger and that the basic public policy rationale underlying the firefighters's rule is the spreading to the public of the costs of employing safety officers and compensating them for any injuries they may sustain in the course of their employment). In Neighbarger, the court distinguished private versus public employees in refusing to extend the rule to a private safety employee but discussed at length the development of the public policy rationale necessitating the firefighter's rule, concluding that the public by employing firefighters [and police officers] and taxing itself for their services, has in effect, "purchased exoneration from [a] duty of care and should not have to pay twice, through taxation and through individual liability, for that service." Id. at 543. See also Hubbard v. Boelt, 28 Cal.3d 480, 620 P.2d 156 (1980)(finding that one who has voluntarily

confronted a known risk cannot recover for injuries based on public policy that precludes tort recovery by fireman or policemen who are presumably adequately compensated in special salary, retirement, and disability benefits for undertaking hazardous work).

In addition, Plaintiff even concedes that by statute she is required to retrieve stray dogs. Here, Officer Cole had attempted to and did rescue/retrieve other dogs previously in her career, and cannot now complain of the very negligence that necessitates her job. See Neighbarger at 540(noting that the firefighter cannot complain of negligence in the creation of the very occasion for his engagement). Plaintiff's argument that Pinter only applies to firefighters and to an initial act of negligence that caused a fire and rescue and that here Plaintiff is not a firefighter and this case does not involve fire or rescue, is therefore unconvincing.

The fact that the court failed to expand the rule to a superintendent of public works in Mullen does not change the result in this case. See Mullen v. Cedar River Lumbar Co., 246 Wis.2d 524, 630 N.W.2d 574 (Ct. App. 2001)(refusing to expand Hass/Pinter to a superintendent of public works, stating that EMT's and firefighters were distinguishable in that they are professional rescuers specially trained and employed to conduct rescue operations in dangerous emergencies). Plaintiff asserts that Mullen did not extend the firefighter's rule because the plaintiff's response to the scene in that case was only a small part of plaintiff's job and that here, Plaintiff's response to a stray dog was also a miniscule part of her job. Clearly, the court has recently expanded the rule to include EMT's, and the job of a police officer is arguably even more similar to a firefighter than an EMT. In addition, this case is clearly distinguishable from that of a public works superintendent. First, a superintendent of public works is not charged with a general duty to keep patrol and protect the community from various unknown hazards like the police officer. Second, even if only a small part of her job, Officer Cole's capture and handling of Defendants' dog was nevertheless clearly a function of her job of ensuring the safety of the community. Accordingly, the firefighter's rule is properly extended to Officer Cole.

The Court is aware that the firefighter's rule has yet to be expanded in Wisconsin to police officers. Such a case has apparently not arisen and has not yet been addressed by the Wisconsin Supreme Court. However, the court is hesitant to allow recovery under the facts of this case. Clearly police officers are injured by others' negligence in many if not all cases as that negligence necessitates their employment. Allowing police officers to sue for that very negligence is not in line with the public policy recognized by the firefighter's rule, which has been further extended to EMT's in Wisconsin. Accordingly and because the Court has found that the "firefighter's rule" is applicable to the facts of this case, Plaintiff is barred from recovery due to the dog owners' negligence. Therefore, Defendants are entitled to judgment as a matter of law and their motion for summary judgment will be granted accordingly.

CONCLUSION AND FINAL ORDER

Therefore, based upon a thorough review of the record and the arguments of the parties as set forth in their briefs, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment is granted.

2. Plaintiff's Complaint is dismissed.

Dated this 12 day of April, 2002.

BY THE COURT:

/S/ HON. WILLIAM J. HAESE

Judge William J. Haese
Milwaukee County Circuit Court, Branch 22

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

01CV007770

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

v.

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

ABC INSURANCE COMPANY,

Defendants.

HON. WILLIAM J. HAESE, BR. 22

CIVIL A

Case No.

FILED AND AUTHENTICATED
AUG 21 2001
JOHN BARRETT
Clerk of Circuit Court

JURY DEMAND FEE 12
PERSON $72.00 PAID

SUMMONS

THE STATE OF WISCONSIN

To each person named above as defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, 53233, and to Eggert & Cermele, S.C., plaintiff's attorneys

whose address is 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin, 53202. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 21st day of August, 2001 in Milwaukee, Wisconsin.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
Suite 303
Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

01CV007770

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

v.

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

ABC INSURANCE COMPANY,

Defendants.

Case No.

Case Code: 30107
(Personal Injury - Other)

FILED AND AUTHENTICATED
AUG 21 2001
JOHN BARRETT
Clerk of Circuit Court

COMPLAINT

The above-named plaintiff, by her attorneys, Jonathan Cermele and Eggert & Cermele, S.C., as and for claims against the above-named defendants, alleges and shows to the court as follows:

1. Plaintiff, Julia Cole, (Officer Cole), is an adult citizen of the State of Wisconsin, residing in the City and County of Milwaukee, whose working address is 749 West State Street, Milwaukee, Wisconsin, 53233, and is employed as a police officer with the City of Milwaukee Police Department (MPD).

2. Defendants, Aubrey Hubanks and Yvonne L. Hubanks (collectively "the Hubanks") are adult residents of the State of Wisconsin, are believed to be husband and wife and, whose last known address was 5280 North 65th Street, Milwaukee, Wisconsin.

3. Defendant, ABC Insurance Company, is as of yet an undetermined insurance carrier

JURY DEMAND FEE 12
PERSON $72.00 PAID

which, upon information and belief, was at all times pertinent hereto duly licensed to engage in the business of writing homeowner's and liability insurance policies in the State of Wisconsin and did have in full force and effect, a policy of liability insurance covering the Hubanks, for injuries such as those alleged in this Complaint.

4. On January 8, 2001, Officer Cole, while on duty and acting in her official capacity as a Police Officer with the MPD, attempted to subdue an Akita dog which had been running loose in the street at the approximate intersection of West Villard Avenue and North 55th Street in the City of Milwaukee. However, before Officer Cole was able to gain control of the Akita dog, it lunged at her, without provocation or warning, knocked her to the ground and repeatedly bit her in and about the face, neck and ear.

5. At all times pertinent hereto, the Hubanks did own the Akita dog which attacked Officer Cole.

6. At all times pertinent hereto, the Hubanks were negligent and careless in the manner in which they cared for the Akita dog which attacked Officer Cole, allowing it to run at large.

7. At all times pertinent hereto, the Hubanks were negligent and careless in knowingly continuing to harbor a dangerous animal which had, on information and belief, on at least one prior occasion, attacked, without provocation or warning, and injured another citizen.

8. As a direct and proximate result of the aforementioned negligent and careless acts and omissions of the Hubanks, Officer Cole suffered multiple serious and permanent injuries including, but not limited to: severe lacerations to her neck, face and ear; loss of flesh to her ear; and frequent and prolonged headaches. Additionally, Officer Cole has incurred, and will incur in the future, great pain, suffering and disability, medical expenses and lost wages, all to her damage in a sum to be determined at trial.

WHEREFORE, plaintiff demands judgment:

a. Against the defendants, awarding compensatory damages in an amount to be determined at trial;

b. Double damages, as provided under §174.02(1)(b), Wis. Stats.;

c. Penalties as required under §174.02(2), Wis. Stats.;

d. Awarding the plaintiff her reasonable costs and disbursements in this action; and

e. Such other relief the Court finds as just and reasonable.

Dated this 21st day of August, 2001.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
Suite 303
Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

Plaintiff hereby demands trial by a 12 person jury pursuant to §805.01(2) and §756.096(3)(b), STATS.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

-vs-

YVONNE L. HUBANKS, AUBREY HUBANKS, and ABC INSURANCE COMPANY,

Defendants.

Case No. 01-CV-007770
Code No. 30107

ANSWER TO PLAINTIFF'S COMPLAINT

NOW COME the defendants Yvonne L. Hubanks and Aubrey Hubanks, by their attorneys, PETERSON, JOHNSON & MURRAY, S.C., and in answer to the complaint of the plaintiff, admit, deny, allege and show to the court as follows:

1. In answer to paragraph 1, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

2. In answer to paragraph 2, admit the allegations contained therein.

3. In answer to paragraph 3, deny each and every allegation contained therein.

4. In answer to paragraph 4, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

5. In answer to paragraph 5, admit that they did own an Akita dog, but deny knowledge or information sufficient to form a belief as to whether such dog attacked officer Cole.

6. In answer to paragraph 6, deny any negligence or carelessness on the part of these answering defendants, deny that they allowed their dog to run at large, and deny knowledge or information sufficient to form a belief as to whether their dog attacked the plaintiff.

7. In answer to paragraph 7, deny any negligence or carelessness on the part of these answering defendants, deny that their dog was a dangerous animal, deny that they harbored a dangerous animal, and deny that the dog previously attacked anyone.

8. In answer to paragraph 8, deny any negligence or carelessness on the part of the defendants, or either of them, deny that any alleged negligence or carelessness on the part of either resulted in any injury or damage to the plaintiff, and deny knowledge or information sufficient to form a belief as to every other allegation contained therein.

9. As and for a first affirmative defense, allege that at and prior to the accident involved herein, the plaintiff was careless and negligent and that such carelessness and negligence was the sole and exclusive cause of any injuries or damages allegedly sustained by her.

10. As and for a second affirmative defense, allege that the complaint fails to state a claim upon which relief can be granted.

11. As and for a third affirmative defense, allege that the plaintiff may have received benefits pursuant to policies or plans of health, medical, disability or workers compensation insurance and that, to the extent of any benefits so received, such insurers or groups are subrogated, necessary parties hereto and the real parties in interest.

WHEREFORE, these answering defendants demand judgment dismissing the complaint, on the merits, with costs and disbursements and such other relief as may be just or equitable.

TRIAL BY A JURY OF 12 OF ALL ISSUES PROPERLY TRIABLE TO A JURY IS HEREBY DEMANDED.

Dated at Milwaukee, Wisconsin, this 10th day of September, 2001.

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants.
Yvonne L. Hubanks and Aubrey Hubanks

By: _____
James T. Murray, Jr.
State Bar No. 01016026

P.O. ADDRESS:

733 North Van Buren Street
Milwaukee, WI 53202-4792
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PETERSON, JOHNSON & MURRAY, S.C.

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*ALSO ADMITTED IN OHIO
**ALSO ADMITTED IN MICHIGAN

September 10, 2001

Writer's E-Mail Address:
jmurray@pjmlaw.com

The Honorable William J. Haese, Branch 22
Milwaukee County Courthouse
901 N. Ninth St.
Milwaukee, WI 53233

RECEIVED
SEP 11 2001
EGGERT &

RE: Cole v. Hubanks, et al.
Case No.: 01-CV-007770
Date of Incident: January 8, 2001

Judge Haese:

I enclose the original Answer for filing on behalf of defendants Yvonne L. Hubanks and Aubrey Hubanks in the above-entitled matter. By copy of this letter, I am serving a copy on plaintiff's counsel, together with a copy of our first set of interrogatories. The original of the latter document is being retained in our file.

Thank you for your assistance.

Very truly yours,

PETERSON, JOHNSON & MURRAY, S.C.

James T. Murray, Jr.

JTM:dla
Enclosures
::ODMA\WORLDOX\F:\DOCS\02\770\00075704.WPD

cc: Jonathan Cermele, Esq. (w/ enclosures)

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

CITY OF MILWAUKEE
200 East Wells Street
Milwaukee, WI 53202,

Involuntary Plaintiff,

v. Case No. 01-CV-007770

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
6000 American Parkway
Madison, WI 53783,

Defendants.

FILED AND AUTHENTICATED
OCT 22 2001
JOHN BARRETT
Clerk of Circuit Court

SUMMONS FOR AMENDED COMPLAINT

THE STATE OF WISCONSIN

To each person named above as defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The amended complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the amended complaint. The

court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, 53233, and to Eggert & Cermele, S.C., plaintiff's attorneys whose address is 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin, 53202. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the amended complaint, and you may lose your right to object to anything that is or may be incorrect in the amended complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 22ND day of October, 2001 in Milwaukee, Wisconsin.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
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Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

CITY OF MILWAUKEE
200 East Wells Street
Milwaukee, WI 53202,

Involuntary Plaintiff,

v.

Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

AMERICAN FAMILY MUTUAL INSURANCE COMPANY
6000 American Parkway
Madison, WI 53783,

Defendants.

FILED AND AUTHENTICATED
OCT 22 2001
JOHN BARRETT
Clerk of Circuit Court

AMENDED COMPLAINT

The above-named plaintiff, by her attorneys, Jonathan Cermele and Eggert & Cermele, S.C., as and for claims against the above-named defendants, alleges and shows to the court as follows:

1. Plaintiff, Julia Cole ("Officer Cole"), is an adult citizen of the State of Wisconsin, residing in the City and County of Milwaukee, whose working address is 749 West State Street,

Milwaukee, Wisconsin, 53233, and is employed as a police officer with the City of Milwaukee Police Department ("MPD").

2. That Involuntary Plaintiff, City of Milwaukee ("City"), is a political subdivision organized and existing under the laws of the State of Wisconsin, with its principal place of business, main offices and mailing address located at 200 East Wells Street, Milwaukee, Wisconsin, 53202. Said Involuntary Plaintiff is self-insured and has paid medical and hospital expenses on behalf of Officer Cole, on account of injuries alleged herein and, as such, may claim a subrogated interest in this action under §102.29, Wis. Stats., and therefore is a proper party to this action pursuant to §803.03, Wis. Stats.

3. Defendants, Aubrey Hubanks and Yvonne L. Hubanks (collectively "the Hubanks"), are adult residents of the State of Wisconsin, are believed to be husband and wife and, whose last known address was 5280 North 65th Street, Milwaukee, Wisconsin, 53218.

4. Defendant, American Family Mutual Insurance Company, ("Am-Fam"), is a domestic company, existing under the laws of the State of Wisconsin, with its principal place of business located at 6000 American Parkway, Madison, Wisconsin, 53783. At all times material hereto, Am-Fam was duly licensed to engage in the business of writing homeowner's and liability insurance in the State of Wisconsin and did have in full force and effect a policy of homeowner's liability insurance, issued to the Hubanks and covering injuries such as those alleged in this complaint.

5. On January 8, 2001, Officer Cole, while on duty and acting in her official capacity as a Police Officer with the MPD, happened upon a loose Akita dog ("the Akita") roaming the street in the vicinity of the 5500 block of West Villard Avenue in the City and County of Milwaukee. Fearing that the Akita would be struck by a motor vehicle, seeing no apparent hazards or dangers immediately presented by the Akita, and complying with her professional obligations under §174.042, Wis. Stats., Officer Cole attempted to gain control of the Akita; however, before Officer Cole was able to do so, it lunged at her, without provocation or warning, knocked her to the ground

and repeatedly bit her in and about the face, neck and ear.

6. At all times pertinent hereto, the Hubanks did own the Akita which attacked and injured Officer Cole.

7. Upon information and belief, the Akita had, on at least one prior occasion, attacked and injured another citizen without provocation or warning.

8. At all times pertinent hereto, the Hubanks were negligent and careless in the manner in which they cared for the Akita which attacked and injured Officer Cole, allowing it to run at large.

9. At all times pertinent hereto, the Hubanks were negligent and careless in the manner in which they restrained the Akita which attacked and injured Officer Cole, by failing to properly secure the Akita.

10. At all times pertinent hereto, the Hubanks were negligent and careless in: knowingly continuing to harbor what they knew to be a dangerous animal, as that term is defined in Chapter 78 of the Milwaukee Code of Ordinances, in violation of said Ordinance; failing to properly confine and muzzle the Akita, given its known dangerous propensities, in violation of Chapter 78 of the Milwaukee Code of Ordinances, and; failing to warn the public as to the known dangerous nature of their Akita, by means of placement of a muzzle on the Akita or otherwise, where the Akita had, on information and belief, on at least one prior occasion, attacked, without provocation or warning, and injured another citizen, in violation of Chapter 78 of the Milwaukee Code of Ordinances.

11. As a direct and proximate result of the aforementioned negligent and careless acts and omissions of the Hubanks, Officer Cole suffered multiple serious and permanent injuries including, but not limited to: severe lacerations to her neck, face and ear; loss of flesh to her ear; and frequent and prolonged headaches. Additionally, Officer Cole has incurred, and will incur in the future, great pain, suffering and disability, medical expenses and lost wages, all to her damage in a sum to be determined at trial.

12. The Hubanks are strictly liable for violations of Chapter 78 of the Milwaukee Code

of Ordinances which resulted in the injury to Officer Cole.

13. The Hubanks are strictly liable for violations of section 174.02, Wis. Stats. which resulted in the injury to Officer Cole.

WHEREFORE, plaintiff demands judgment:

a. Against the defendants, awarding compensatory damages in an amount to be determined at trial;

b. Double damages, as provided under §174.02(1)(b), Wis. Stats.;

c. Penalties as required under §174.02(2), Wis. Stats.;

d. Awarding the plaintiff her reasonable costs and disbursements in this action; and

e. Such other relief the Court finds as just and reasonable.

Dated this 22nd day of October, 2001.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
Suite 303
Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

Plaintiff hereby demands trial by a 12 person jury pursuant to §805.01(2) and §756.096(3)(b), STATS.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

and

CITY OF MILWAUKEE,

Involuntary Plaintiff, Case No. 01-CV-007770

vs.

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

NOW COME the defendants Yvonne L. Hubanks and Aubrey Hubanks, by their attorneys, PETERSON, JOHNSON & MURRAY, S.C., and in answer to the amended complaint of the plaintiff, admit, deny, allege and show to the court as follows:

1. In answer to paragraph 1, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

2. In answer to paragraph 2, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

3. In answer to paragraph 3, admit the allegations contained therein.

4. In answer to paragraph 4, admit the allegations contained therein except that such policy of insurance was and is subject to all the terms, provisions, limitations, exclusions,

conditions contained therein and deny that such policy covers injuries such as those alleged in the complaint.

5. In answer to paragraph 5, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

6. In answer to paragraph 6, admit the Hubanks did own an Akita dog, but deny knowledge or information sufficient to form a belief as to whether such dog attacked Officer Cole.

7. In answer to paragraph 7, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

8. In answer to paragraph 8, deny any negligence or carelessness on the part of these answering defendants, deny that they allowed their dog to run at large, and deny knowledge or information sufficient to form a belief as to whether their dog attacked the plaintiff.

9. In answer to paragraph 9, deny any negligence or carelessness on the part of these answering defendants, in the manner in which they restrained their Akita, deny that they failed to properly secure their Akita, and deny knowledge or information sufficient to form a belief as to whether the dog attacked and injured the plaintiff.

10. In answer to paragraph 10, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

11. In answer to paragraph 11, deny any negligence or carelessness on the part of these answering defendants, or either of them, deny that any alleged negligence or carelessness on the part of either caused or resulted in any injury or damage to the plaintiff, and deny knowledge or information sufficient to form a belief as to every other allegation contained therein.

12. In answer to paragraph 12, deny each and every allegation contained therein.

13. In answer to paragraph 13, deny each and every allegation contained therein.

14. As and for a first affirmative defense, allege that at and prior to the accident involved herein, the plaintiff was careless and negligent and that such carelessness and negligence was the sole and exclusive cause of any injuries or damages allegedly sustained by her.

15. As and for a second affirmative defense, allege that the complaint fails to state a claim upon which relief can be granted.

16. As and for a third affirmative defense, allege that the plaintiff may have received benefits pursuant to policies or plans of health, medical, disability or workers compensation insurance and that, to the extent of any benefits so received, such insurers or groups are subrogated, necessary parties hereto and the real parties in interest.

WHEREFORE, these answering defendants demand judgment dismissing the amended complaint, on the merits, with costs and disbursements and such other relief as may be just or equitable.

TRIAL BY A JURY OF 12 OF ALL ISSUES PROPERLY TRIABLE TO A JURY IS HEREBY DEMANDED.

Dated at Milwaukee, Wisconsin, this 31th day of October, 2001.

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants

By: _____
Ricardo Perez
State Bar No. 1035351

P.O. ADDRESS:
733 North Van Buren Street
Milwaukee, WI 53202-4792
414/278-8800
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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

and

CITY OF MILWAUKEE,

Involuntary Plaintiff, Case No. 01-CV-007770

vs.

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

BRIEF IN SUPPORT OF MOTION SUMMARY JUDGMENT

This lawsuit arises out of a dog bite that occurred on January 8, 2001. The plaintiff, while on duty as a police officer for the City of Milwaukee, came upon an Akita dog owned by the defendants, Hubanks, which had been running loose. She attempted to gain control of the dog, but while in the process, the dog bit her in her face, neck and ear areas.

Plaintiff brought this suit against the owners of the dog and their insurance company, alleging that they were negligent in several respects. In her amended complaint, the plaintiff alleges that the Hubanks were negligent as follows:

1. In the manner in which they cared for the dog, allowing it to run at large; (Plaintiff's amended complaint at ¶ 8)

2. In the manner in which they restrained the dog which attacked the plaintiff, by failing to properly secure it (Plaintiff's amended complaint at ¶ 9)

3. In knowingly continuing to harbor what they knew to be a dangerous animal. (Plaintiff's amended complaint at ¶ 10)

4. In failing to properly confine and muzzle the dog, given its known dangerous propensities; (Plaintiff's amended complaint at ¶ 10)

5. In failing to warn the public as to the known dangerous nature of their dog, by means of placement of a muzzle on it or otherwise; (Plaintiff's amended complaint at ¶ 10).

Under the rule commonly referred to as the "firefighter's rule," defendants respectfully request this court to grant summary judgment to them dismissing plaintiff's amended complaint on its merits and with costs.

I. THE FIREFIGHTER'S RULE PRECLUDES RECOVERY.

The firefighter's rule was most recently discussed by the Supreme Court of Wisconsin in Pinter v. American Family Mutual Ins. Co., 236 Wis. 2d 137, 613 N.W.2d 110. In that case, an emergency medical technician had sustained injuries while providing emergency assistance to a passenger who had been injured in an automobile accident. He brought an action against the drivers of the automobiles involved in the accident, and argued that his injuries were the direct and proximate result of their negligence. Pinter at 137. The defendants moved for summary judgment, arguing that the "firefighter's rule" barred any negligence action against the drivers by the EMT. The trial court granted the motion. The summary judgment was appealed to the Court of Appeals, and the Court of Appeals certified it to the Supreme Court. The Supreme Court ultimately affirmed the judgment of the circuit court dismissing the case on summary judgment.

The "firefighter's rule" was first set forth in Hass v. Chicago & North Western Railway, 48 Wis. 2d 321, 179 N.W.2d 885 (1970). In that case, the court held that "one who negligently starts a fire is not liable for that negligence when it causes injury to a firefighter who comes to extinguish

the blaze." Hass at 327. Although Hass involved a firefighter, the Supreme Court in Pinter held that the rule was applicable to an EMT as well.

The Pinter court noted that most jurisdictions across the country limit liability in negligence cases under a theory of law commonly termed the "firefighter's rule." Pinter at 144. The Pinter court noted that as applied to firefighters, this rule limits a firefighter's ability to recover damages for injuries sustained while performing his or her duties as a firefighter. Pinter at 144. The court also noted that more recently, courts have justified the rule on public policy grounds. Pinter at 145. Various cases since the Hass case have clarified the Hass decision to indicate that it only precludes a negligence action when it is based on the initial act of negligence that caused the fire and necessitated rescue. In the present case, the negligence action against the dog owners is based on their initial acts of alleged negligence, in failing to secure their dog and muzzle him. Those are the acts of alleged negligence which called Officer Cole to the scene where she was injured by the dog. Thus, pursuant to the "firefighter's rule", the Hubanks cannot be liable for the damages sustained by Cole.

In Pinter, the court considered the public policy analysis set forth in the Hass decision, and noted that:

> We are convinced that the public policy analysis in Hass remains sound. It is still true that nearly all fires are caused by negligence. See Hass 48 Wis. 2d at 327, 179 N.W.2d 885. It is therefore still true that permitting firefighters to pursue negligence actions based on the negligent act of starting a fire would place an unreasonable burden on the owners and occupiers of premises and would enter a field with no sensible or just stopping point. See Id.

Pinter at 154.

The court went on to note that the "firefighter's rule" would be extended to the plaintiff in this case, an EMT. The Pinter court noted that firefighting and emergency medical assistants are closely related professions. The court noted that members of these professions have special training and experience to prepare them to provide assistance under dangerous emergency conditions. People in these professions know they will be expected to provide aid and protection to others in hazardous circumstances, and, both are professions wherein they are considered professional rescuers specially trained and employed to conduct rescue operations in dangerous emergencies. Pinter at 156.

In the present case, the plaintiff is a police officer. She had to have special training to prepare her for her dangerous occupation. She knew, in becoming a police officer, that she would be required to provide aid and protection to others in hazardous circumstances. She chose to attempt to catch the defendant's dog as part of her job as a police officer. Clearly, a police officer should fall into the same category as a firefighter or EMT and the "firefighter's rule" should apply in this case.

CONCLUSION

Based on the foregoing arguments and authorities, defendants respectfully request that this court grant their motion for summary judgment, and dismiss the plaintiff's claims on the merits and with costs.

Respectfully submitted,

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants

By: Janet E Cain

Janet E. Cain
State Bar No. 01002721

P.O. ADDRESS:
733 North Van Buren Street
Milwaukee, WI 53202-4792
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STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE

Plaintiff,

and

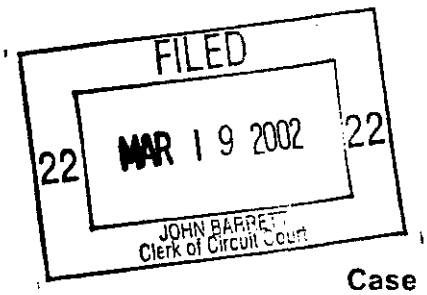
CITY OF MILWAUKEE

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

Defendants.



Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The above named plaintiff, by her attorneys, Eggert & Cermele, S.C. and Jonathan Cermele, as and for her Brief in Opposition To Defendants' Motion For Summary Judgment, alleges and shows to the court as follows:

I. FACTS

On January 8, 2001, Police Officer Julia Cole ("Officer Cole") was traveling in a marked Milwaukee Police Department ("MPD") squad car westbound on Villard Ave., at the approximate intersection of 55th Street, when she saw a dog dragging an 8 foot chain crossing Villard Ave. ***Officer Cole's Deposition Transcript,*** *marked as "Exhibit A" to the* ***Affidavit of Jonathan Cermele*** *@ 23-24.* She was never dispatched to the scene, but simply happened upon the stray dog. ***Id.*** *@ 24.*

By the time the squad car had come to a stop, the dog had crossed Villard Ave. and was walking slowly Northbound on 55th Street. ***Id.*** *@ 26.* Officer Cole grabbed the end of the chain

with her left hand, using her right hand to beckon the dog closer, and continually talking to the dog in a calm manner. ***Id.*** *@ 30 & 33.* At all times she tried to be cautious so as not to scare the dog. ***Id.***

Officer Cole estimated the dog to weigh 85-90 pounds. ***Id.*** *@ 32.* It appeared calm and "happy;" walking slowly toward her and wagging its tail. ***Id.*** *@ 30.* It did not appear vicious. ***Id.*** Officer Cole squatted down and let the dog sniff her hand. ***Id.***

Then, without warning or provocation, the dog lunged at Officer Cole's neck, knocking her to the ground and "latching on to [her] face." ***Id.*** *@ 33.* Officer Cole was shocked. ***Id.*** She had assumed the dog would have growled, barked or shown some aggressive posture if it was going to attack. ***Id.*** *@ 34.* Eventually, she was able to use her left hand to push the dog off her face. ***Id.*** *@ 34.* She unholstered her service weapon and aimed at the dog in case it attacked again. ***Id.*** *@ 25.* However, the dog just sat there and stared at her. ***Id.*** *@ 35.*

Officer Cole again grabbed the chain to keep the dog from running away. As a result of the dog bites, Officer Cole received 3 lacerations; 1 on the right earlobe, where "it was almost torn off"; one close to the right carotid artery, and; one just below the right jaw line. ***Id.*** *@ 39.* She was taken from the scene by ambulance to St. Joseph's Hospital where she received thirty stitches to her face and ear. ***Id.*** *@ 38.*

At no time did the dog growl or give any indication it would attack. ***Id.*** *@ 39.*

II. ANALYSIS

Defendants urge this Court to expand the current law in relation to the Firefighter's Rule ("Rule"), seeking its application to a Police Officer who was severely injured after coming upon a situation where the Police Officer determined it was necessary to take police action. Defendants provide no reason as to why the existing legal standards for applying the Rule should be modified and then applied to bar Officer Cole's cause of action.

Plaintiff requests this Court to deny defendants' Motion, on the grounds that 1) public policy is not furthered by expanding the Rule to Police Officers, and that, 2) the Rule is not a bar to Officer Cole's specific causes of action.

A. Origin of the Firefighter's Rule in Wisconsin.

The Rule was initially adopted in Wisconsin as a result of our Supreme Court's decision in ***Hass v. Chicago & Northwestern Railway,*** *48 Wis.2d 321, 179 N.W.2d 885 (1970).* There, a firefighter was injured when he *responded* to a fire which was allegedly caused by the negligence of a railroad. The plaintiff sued the railroad, alleging general negligence and failure to warn. The Court dismissed both claims, reasoning that the hazards of fire were apparent and the landowner had no duty to warn a firefighter. The Court stated:

> *The hazard of fire feared by the landowner and for which he asks aid in fighting is the very reason for the summons to duty.* The call to duty is the warning of the hazard; and even *in the absence of a summons by the occupier of the land, the hazards of the fire are apparent* . . . the duty of a landowner to a firefighter in respect to a warning of the hazard is satisfied by the very nature of the call for assistance. ***Id.*** *@ 324-324, 179 N.W.2d @ 887. (emphasis added)*

The Court then held that one who negligently starts a fire cannot be liable for that negligence when it causes injury to a firefighter who comes to extinguish the blaze. ***Id.*** *@ 327, 179 N.W.2d @ 888.*

B. Subsequent modifications to, and interpretations of, the Rule.

Clark v. Corby, *75 Wis.2d 292, 249 N.W.2d 567 (1977)*, addressed the Rule in terms of whether a landowner owes any duty to a firefighter who is injured while fighting a fire, where the injury is due to "special hazards." There, the plaintiff firefighter had sued under three different

theories of liability: 1) common negligence for starting the fire; 2) negligence in failing to warn of known hidden-hazzards, and; 3) negligence for violating housing codes. The Court dismissed the common negligence claim under ***Hass***, but allowed the other claims to proceed to trial. In so doing, the Court held that:

> 1. The Rule was not a bar to a claim of failure-to-warn;
>
> 2. A homeowner has a duty to warn a firefighter of hidden hazzards known to homeowner but not the firefighter, where homeowner had the opportunity to warn, and;
>
> 3. The Rule was not a bar to a negligence claim based upon a municipal code violation, if the plaintiff could prove the housing code was enacted to protect a firefighter in the performance of his duties. ***Id.*** *@ 297-300, 294 N.W.2d @ 570-573.*

Wright v. Coleman, *148 Wis.2d 897,436 N.W.2d 884 (1989),* addressed the Rule in terms of whether a defendant had a duty to warn of known hazards, as opposed to the"hidden" hazards in ***Clark***. In ***Wright***, a firefighter was injured when he slipped on ice at a fire scene. The Court found the homeowner had a duty to warn of known hazzards, and that the homeowner would be negligent for failure to warn if, under the circumstances, it would have been reasonable to do so. ***Id.*** *@ 907, 436 N.W.2d @ 869.* The Rule is therefore not a bar to a claim based upon failure to warn.

However, **Wright** is also significant because it clarified the general holding in ***Hass***, stating that the Rule was "nothing more than a *limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread.*" ***Hauboldt*** *@ 673, 467 N.W.2d @ 512, citing to* ***Wright*** *@ 902, 436 N.W.2d 864. (emphasis added).*

Hauboldt v. Union Carbide, *160 Wis.2d 662, 467 N.W.2d 508 (1991)* addressed the Rule in terms of whether a firefighter could proceed against a 3rd party for injuries sustained in the course

of a fire. There, a firefighter was injured by the unexpected explosion of a defective acetylene tank and not by the fire or structural damage incidentally resulting from the explosion. ***Hauboldt*** stands for the proposition that, if a firefighter didn't have an opportunity to prepare for the danger which caused his injury, and the danger was not apparent or anticipated, a cause of action based upon injuries resulting from an intervening event can proceed. ***Id.*** *@ 667, 467 N.W.2d @ 508.*

The most recent Supreme Court decision came in ***Pinter v. American Family Insurance Co.***, *2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110 (2000).* There, the Court recognized that ***Hass*** barred a cause of action *only when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency*. ***Id.*** *2000 WI 75 @ ¶ 31, 236 Wis.2d 137, 613 N.W.2d 110.*

Pinter extended the Rule beyond its historical context of applying only to firefighters, and applied it to an Emergency Medical Technician ("EMT") who was *dispatched* to the scene of a motor vehicle accident and was injured while attempting to rescue a motorist. Expansion of the Rule to encompass EMT's was due, in its entirety, to the extremely similar professions of firefighter and EMT; both were specifically trained for, and had as their sole or major function, life saving and rescuing. ***Id.*** *@ ¶ 43 & 44.* The Court stated:

> . . . *Firefighting and emergency medical assistance are closely related professions*; like Pinter, some EMT's also serve as firefighters. Members of both professions have special training and experience that prepare them to provide assistance under dangerous and emergency conditions . . . *In short, both firefighters and EMT's are professional rescuers who are specifically trained and employed to conduct rescue operations in dangerous emergencies* . . . . *(emphasis added).*
>
> * * *
>
> *The facts of Pinter's case illustrate this point. Pinter had helped to extricate injured individuals from automobiles on over two hundred occasions*. Pinter's

> injury occurred because he was required to maintain an awkward position for an extended period of time to avoid aggravating the passenger's spinal injuries. *Thus, because of his position as a specially trained, experienced EMT, Pinter was asked to put himself in harm's way for the protection of another, more seriously endangered individual* . . . . ***Id.*** @ ¶43-44. *(emphasis added).*

The main function of Police Officers, on the other hand, is the detection and prevention of crime and the apprehension of criminals. ***Affidavit of Jonathan Cermele*** @ *Exhibit C @ p.136 (i.e., Milwaukee City Charter, §22-08, Police Powers & Duties).* While Police Officers may, in the course of their employment, occasionally enter into the "rescuer" mode, those situations are few and far between, and certainly neither their primary function, nor one for which they are trained. ***Affidavit of Bradley DeBraska.***

The most recent pronouncement of the Rule came from our Court of Appeals in ***Mullen v. Cedar River Lumbar Co.***, *246 Wis.2d 524, 630 N.W.2d 574 (Ct.App. 2001).* That case addressed whether a superintendent of public works who was injured when responding to an oil spill, could maintain a cause of action against the company whose truck had dumped the oil. There, the defendants sought to apply the Rule under ***Hass*** and ***Pinter***, arguing that the plaintiff, as superintendent of public works, had special knowledge & experience in oil spills and was specifically called to the scene because of that knowledge and experience. However, the Court of Appeals distinguished ***Hass*** and ***Pinter***, stating that firefighters & EMT's were both professional rescuers who were specifically trained and employed to conduct rescue operations in dangerous emergencies. The Court stated:

> *Although the superintendent had experience and some training in responding to fuel oil spills, fuel oil spills constitute only a small part of plaintiff's job as superintendent of public works* (i.e. also responsible for garbage removal, recycling program, road maintenance and snow removal). ***Id.*** @ ¶15. (emphasis added)

> Given Mullen's limited duties at the time of a fuel spill and the infrequency of spills to which he responds, we are unpersuaded that Mullen's role is sufficiently similar to the role of firefighters and EMT's to justify extending the firefighter's rule to include Mullen. Unlike firefighters and EMT's, Mullen is not a professional rescuer who is "specially trained and employed to conduct rescue operations." ***Id.*** @ ¶16, *citing* ***Pinter*** *2000 WI 75 @ ¶ 43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added).*

Defendants would have this Court expand 30 plus years of case law and apply the Rule to Police Officers, where it never has been applied previously. Not only is there no viable legal argument as to why to apply the Rule to Police Officers in general, the facts in this case certainly do not warrant its application.

C. Public Policy is not furthered by expanding the Rule to include Police Officers.

Other than ***Pinter***, every single case addressing the Rule limited its application to firefighters. ***Pinter*** expanded the Rule to EMT's, based solely on the extreme similarity between the two professions, in terms of training, experience and purpose/function. ***Id.***, *2000 WI 75 @ ¶ 43 & 44, 236 Wis.2d 137, 613 N.W.2d 110.*

However, our Court of Appeals in ***Mullen*** declined to accept the argument that, because of that plaintiff's "special knowledge and experience," the Rule should be expanded to also include a superintendent of public works. ***Id.***, *2000 WI App. 142 @ ¶15-16, 246 Wis.2d 524, 630 N.W.2d 574.* ***Mullen*** downplayed the fact that the plaintiff had possessed "experience and some training" in relation to the purpose for him being on the scene. Instead, ***Mullen*** focused on the fact that the reason for the plaintiff responding to the scene, was "only a small part of plaintiff's job" as the superintendent of public works. ***Id.***

The primary function of a Police Officer is not to rescue citizens. ***Affidavit of Bradley DeBraska. Also, Affidavit of Jonathan Cermele*** @ *Exhibit C @ p.136 (i.e., Milwaukee City*

Charter, §22-08, Police Powers & Duties). Police Officers are taught to call either the Fire Department or an ambulance when they come upon an individual in need of medical assistance or rescue. ***Id.*** In rare events, a Police Officer may attempt a rescue or provide extremely basic first aid. ***Id.*** However, as was the case in ***Mullen***, those functions would constitute only a very minor part of a Police Officer's job. ***Affidavit of Bradley DeBraska.***

Similarly, catching stray dogs is not the primary function of a Police Officer. ***See Id.*** While "peace officers" are one category of individuals, along with those of "humane officer" and "local health officer" who have an obligation to capture and restrain a dog running at large, it is certainly not a Police Officer's primary function, nor one which an officer would even expect to perform with any frequency of any consequence. ***Id.***

The Rule is "nothing more than a *limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread.*" ***Hauboldt*** *@ 673, 467 N.W.2d @ 512, citing to* ***Wright*** *@ 902, 436 N.W.2d 864. (emphasis added).* Expanding the Rule to apply to Police Officers would only serve to allow the "limited exception" to swallow the general rule. If the Rule were expanded as urged by defendants, it would be a complete defense to such heretofore uncontemplated situations, such as:

- Barring a building inspector from suing the landowner for negligently failing to properly maintain the structure being inspected, when the inspector is injured after falling through a rotten floor while inspecting the building;
- Barring the surviving spouse of a construction worker from suing a general contractor for wrongful death based upon negligent supervision, after the construction worker is killed when the earthen walls surrounding the ditch he is digging collapse and crush him to death, and/or;
- Barring nurses who work in emergency rooms or ambulances from suing negligent patients when they are injured as a result of the patient's negligence.

As these examples demonstrate, expanding the Rule to Police Officers would be against public policy, as it would "enter a field that has no sensible or just stopping point." ***Hass*** @ *327, citing* ***Colla v. Mandella****, 1 Wis.2d 594, 598, 85 N.W.2d 345, 348 (1957).* Such an expansion would also be inconsistent with the public policy stated in ***Pinter*** (i.e., because EMT's, like firefighters, are *professional rescuers who are highly trained in life saving procedures*, they will be precluded from bringing a claim of negligence based *solely* upon the same negligent act which necessitated the rescue and therefore *brought* the firefighter/EMT to the scene of the emergency). *See* ***Pinter****, 2000 WI 75 @ 31, 236 Wis.2d 137, 613 N.W.2d 110.*

It is only in the unusual or very clear case that a court can conclude, as was done in ***Haas*** and ***Pinter***, that, despite negligent conduct, as a matter of law (i.e., appropriate public policy) there shall be no recovery. ***Wright*** *@ 908, 436 N.W.2d @ 868-869.* As a result, the public policy which led ***Pinter*** to expand the Rule to EMT's doesn't exist in the present case, this Court should be guided by our Court of Appeals' decision in ***Mullen*** and refuse to apply the Rule to Police Officers.

D. Neither of defendants' theories as to why the Rule should apply to Officer Cole is persuasive.

Defendants base their motion on two theories. They argue that Officer Cole's training and experience supports applying the Rule under ***Pinter***. ***Defendants' Brief In Support Of Motion For Summary Judgment*** *@ 4.* They also argue that, because Officer Cole's claims are based upon the defendants' "initial acts of alleged negligence in failing to secure their dog and muzzle him," the Rule bars all of Officer Cole's claims. As authority for that assertion, defendants refer to the "[v]arious," yet un-cited, cases since ***Hass*** which, according to defendants, have clarified ***Hass*** to indicate that it "only precludes a negligence action when it is based upon the initial act of negligence that caused the fire and necessitated rescue." ***Defendants' Brief*** *@ 3.*

Neither argument is sufficient to expand the Rule to apply to Officer Cole's causes of action.

First, the cases to which defendants refer limited the Rule to firefighters, and pertained ONLY to the "initial act of negligence that caused the fire and necessitated the rescue." ***Id.*** Not only does this case *not* involve either a fire or a rescue, Officer Cole's claims fit within recognized exceptions to the Rule. As such, none of the cases to which defendants refer serve as authority for their assertion. Second, defendants cannot overcome the fact that, in ***Mullen***, our Court of Appeals declined to enlarge the scope of the Rule beyond the two similar occupations of firefighter and EMT.

i. The training received by Police Officers is insufficient to warrant application of the Rule under *Pinter*.

Officer Cole simply had no training which would have prepared her for what she encountered. As indicated previously, unlike as is the case with firefighters and EMT's, the main function of Police Officers is the detection and prevention of crime and the apprehension of criminals. ***Affidavit of Bradley DeBraska.*** A Police Officer's training, whether it be in the Police Safety Academy at the beginning of their career or thereafter, is focused on those functions. ***Id.*** While Police Officers may, in the course of their employment, occasionally enter into the "rescuer" mode, those situations are few and far between, and certainly not their primary function, nor one for which they are trained. ***Id.***

Moreover, the MPD doesn't provide any training on how to capture or handle stray dogs. ***Officer Cole's Deposition Transcript*** *@ 11, attached as* ***"Exhibit A" to the Affidavit of Jonathan Cermele.*** Although some MPD squad cars are equipped with a "noose" which is capable of snaring a stray animal, the squad to which Officer Cole was assigned on January 8, 2001, didn't have such a device. ***Id.*** *@ 20.* Even if it had, the MPD doesn't provide any training on how to use the device. ***Id.*** *@ 19.* Furthermore, Officer Cole has never used it herself, nor has she ever seen anyone use it. ***Id.***

ii. Officer Cole's experience in dealing with stray dogs is insufficient to warrant application of the Rule.

Officer Cole never had any experience catching stray dogs during her 12 week "Field Training" after graduating from the Police Safety Academy. ***Id.*** *@ 14.* She never had any experience working with dogs, other than those which she had owned herself. ***Id.*** *@ 30-31.* Prior to her being bitten, Officer Cole had caught a stray dog on only 3-4 occasions. ***Id.*** *@ 15 & 27.* Her lack of experience in dealing with stray dogs is typical. ***Affidavit of Bradley DeBraska.***

As a result of the lack of training on how to restrain and capture stray dogs, Officer Cole's insignificant experience in performing such activities, and the fact that such activity constitutes such an extremely small portion of an Officer's activities, ***Mullen*** prohibits the use of the Rule to bar Officer Cole's claims.

E. The Rule doesn't bar Officer Cole's claims, because they are not based "solely" on the defendants' "initial acts of alleged negligence."

The "[v]arious cases" to which defendants allude since ***Hass***, are ***Clark v. Corby***, ***Wright v. Coleman***, ***Hauboldt v. Union Carbide***, ***Pinter v. American Family*** and ***Mullen v. Cedar River Lumbar Co.*** According to those cases, the Rule does not constitute a bar to any of Officer Cole's causes of action.

Officer Cole's Amended Complaint alleges negligence by defendants under the following theories:

- In the manner in which they cared for the Akita which attacked and injured Officer Cole, allowing it to run at large. ***Amended Complaint*** *@ ¶ 8.*
- In the manner in which they restrained the Akita which attacked and injured Officer Cole, by failing to properly secure the Akita. ***Id.*** *@ ¶ 9.*
- Violating Chapter 78 of the Milwaukee Code of Ordinances, by knowingly continuing to harbor what they knew to be a

dangerous animal, as that term is defined in Chapter 78 of the Milwaukee Code of Ordinances. ***Id.*** @ ¶ *10.*

- Violating Chapter 78 of the Milwaukee Code of Ordinances, by failing to properly confine and muzzle the Akita, given its known dangerous propensities, in violation of Chapter 78 of the Milwaukee Code of Ordinances. ***Id.***

- Failing to warn the public as to the known dangerous nature of their Akita, by means of placement of a muzzle on the Akita or otherwise, where the Akita had, on information and belief, on at least one prior occasion, attacked, without provocation or warning, and injured another citizen, in violation of Chapter 78 of the Milwaukee Code of Ordinances. ***Id.***

- Strict liability for violations of Chapter 78 of the Milwaukee Code of Ordinances which resulted in the injury to Officer Cole. ***Id.*** @ ¶ *12, and.*

- Strict liability for violations of §174.02, Wis. Stats. which resulted in the injury to Officer Cole. ***Id.*** @ ¶ *13.*

i. Any and all causes of action based upon a violation of a Milwaukee Ordinance survive.

All causes based upon a violation of the Milwaukee Code of Ordinances survive, as long as Officer Cole can demonstrate that she, as a Police Officer, was within the scope of those whom the ordinance was meant to protect. ***Clark*** @ *299-300.*

An example where an ordinance would not be meant to protect a plaintiff in the context of the Rule, would be as follows: a firefighter who responds to a fire is burned and sues the homeowner under the theory that the plaintiff failed to comply with an ordinance regulating the removal of lead-based paint. It's reasonable to presume that the intent behind such an ordinance would be to protect people, and especially children, who may come in contact with such a toxic substance. However, because it would not be reasonable to presume the purpose for that ordinance would be to protect people from being burned, it would not serve to insulate a claim from the scope of the Rule.

The municipal ordinance violations alleged in the Amended complaint are meant to protect the safety of the public from dangerous animals. ***See Affidavit of Jonathan Cermele, @ Exhibit B.*** Obviously, Officer Cole is a member of the public. The mere fact that, at the time of her injury she was acting in her capacity as a Police Officer, is not sufficient to take her out of the scope of the ordinance.

Under ***Clark***, all of Officer Cole's causes of action based upon a municipal violation survive. Furthermore, the two causes of action not couched in terms of a municipal violation (i.e., negligence in the manner in which defendants cared for and restrained the dog by allowing it to run at large and not be properly secured) contained in ¶ 8 & 9 of the Amended Complaint, also survive because municipal ordinances regulate the confinement of a dangerous animal. ***See Affidavit of Jonathan Cermele*** *@ Exhibit B.*

ii. Any and all of Officer Cole's causes of action based upon a failure to warn survive.

There is simply no authority to suggest that the Rule bars a cause of action based upon failure to warn. In fact, claims based upon failure to warn have been specifically *excluded* from the Rule's applicability. ***Clark v. Corby*** *@ 299-300, and* ***Wright v. Coleman*** *@ 907.*

Hidden hazzards, such as the propensity of defendants' dog to attack without provocation, are not subject to the Rule where the owner had the opportunity to warn. ***Clark*** *@ 299-300.* As alleged in the Amended Complaint, defendants had the opportunity to warn and could have warned by simply complying with the ordinance which required use of a muzzle; it is reasonable to presume that, if an individual came in contact with a muzzled dog, he/she would presume the dog to be dangerous and, thereby, have been warned of its propensity to attack.

Known hazzards, such as the propensity of defendants' dog to attack without provocation, are also excluded from the Rule where, under the circumstances, it would have been reasonable

to warn. ***Wright*** *@ 907.* Given that Chapter 78 of the Milwaukee Code of Ordinances specifically requires confinement and the use of a muzzle, the "reasonableness" of having to warn must be presumed as a matter of law.

As a result, all of Officer Cole's causes of action alleging a failure to warn survive Under ***Clark*** and ***Wright.***

III. CONCLUSION

For all the above-stated reasons, Officer Cole respectfully requests that this Court deny defendants' Motion for Summary Judgment on the basis that, because public policy is not furthered by expanding the Rule to include Police Officers, defendants are not entitled to judgment as a matter of law. In the alternative, Officer Cole would request the Court decline to address the public policy, and deny defendants' motion for Summary Judgment on the basis that, because all of Officer Cole's claims fit within recognized exceptions to the Rule, as set forth in ***Clark v. Corby*** and ***Wright v. Coleman*** (i.e., they address allegations of: 1) failure to warn where it was both reasonable to warn and defendants had an opportunity to warn, and; 2) municipal violations which are meant to protect persons such as Officer Cole), defendants are not entitled to judgment as a matter of law.

Dated this 19th day of March, 2002.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

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March 19, 2002

Hon. William J. Haese
Circuit Court Judge, Branch 22
Milwaukee County Courthouse
901 North 9th Street
Milwaukee, WI 53233

RE: Cole v. Hubanks, et al.
Case No. 01-CV-000770

Dear Judge Haese:

Enclosed for filing on behalf of the Plaintiff, is an original and a copy of:

- Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment;
- Affidavit of Bradley DeBraska In Opposition To Defendants' Motion For Summary Judgment, and;
- Affidavit of Jonathan Cermele in Opposition To Defendants' Motion For Summary Judgment.

If all meets with your approval, please have your clerk file these documents and return a conformed copy to my messenger.

By copy of this letter, Atty. Janet Cain is being served with this letter and its enclosures by regular US Mail.

Sincerely,

EGGERT & CERMELE, S.C.

/s/

Jonathan Cermele

JC/ldl
Enclosures
pc: P.O. Julia Cole (Via US Mail w/enc)
Atty. Janet Cain (Via US Mail w/enc)
\CAIN SJ CVR

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE

Plaintiff,

and

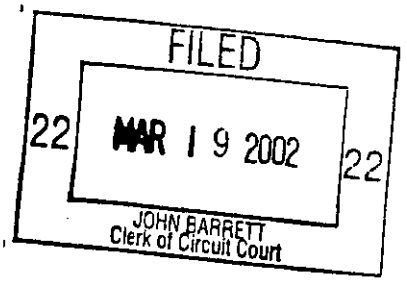
CITY OF MILWAUKEE

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

Defendants.



Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

AFFIDAVIT OF JONATHAN CERMELE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN }
} ss.
MILWAUKEE COUNTY }

I, Jonathan Cermele, being duly sworn upon oath do state that:

1. I am legal counsel for the plaintiff in this action;

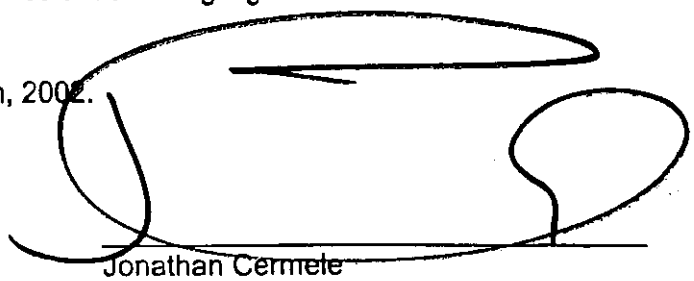
2. I have knowledge of the facts stated herein;

3. Attached and marked as "Exhibit A" is a true and correct copy of those pages of Officer Cole's deposition which are cited in Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment.

4. Attached and marked as "Exhibit B" is a true and correct copy of Chapter 78 of the Milwaukee Code of Ordinances, as referenced and cited in Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment, with those sections pertinent to Officer Cole's causes of action highlighted.

5. Attached and marked as "Exhibit C" is a true and correct copy of Chapter 22 of the Milwaukee City Charter, as referenced and cited in Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment, with those sections pertinent to Officer Cole's causes of action highlighted.

Dated this 19th day of March, 2002.



Jonathan Cermele

Subscribed and sworn to before me this
19th day of March, 2002.

Notary Public, State of Wisconsin
My commission: 6-16-02

IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

STATE OF WISCONSIN

JULIA COLE,

Plaintiff,

COPY

CITY OF MILWAUKEE,

Involuntary Plaintiff,

-vs-

Case No. 01-CV-007770

YVONNE L. HUBANKS
AUBREY HUBANKS
and
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

Examination of JULIA COLE, taken at the instance of the Defendants, under and pursuant to Section 804.05 of the Wisconsin Statutes, pursuant to Stipulation by Respective Counsel, before DEBORAH D. GOFF, a Notary Public in and for the State of Wisconsin, at Milwaukee Police Association, 1840 North Farwell Avenue, Milwaukee, Wisconsin, on the 25th day of February, 2002, commencing at 2:10 p.m. and concluding at 3:17 p.m.

312 East Wisconsin Avenue
Suite 608
Milwaukee, WI 53202
PHONE: (414) 224-9533
FAX: (414) 224-9635

EXHIBIT A

A Correct. Then you do field training, 12 weeks of field training.

Q Are you paid as a student at the academy?

A Yes. Yes.

Q And you said it's about six months of training at the academy, and then 12 weeks of field training?

A Correct.

Q In that six-month time period, that's all classroom training?

A It's classroom training, you do physical training, and DAT training.

Q What does that mean?

A Defense and Arrest Tactics.

Q Okay. Do you have to take some sort of an exam after you complete the training?

A There's many exams during --

Q -- during the process?

A Yes.

Q During that -- let's talk about the six months that you're in the academy before the field training. During that time, do you have any training with respect to how to handle stray dogs?

A Unfortunately, no. I wish there would be, but there is none. There's not even anything on how to use the noose that's in the car.

A But if that person should be out sick or something, then you might have to be partnered with someone else for that day.

Q Okay. In the 12 weeks that you had the field training after you completed the academy, did you have the experience at all of dealing with a loose dog?

A No, I did not.

Q Okay. At any time prior to January 8th of 2001, while a police officer, did you have any occasion to deal with a loose or stray dog that you encountered while in the course of your employment as a police officer?

A A couple times I've had calls where you get there a lot of times, the dog's not there. They're usually gone. And maybe two or three times I've gotten there where -- received a call of a loose dog and the dog was there and I caught the dog and brought it to the station.

Q So typically what happens when there's a loose dog call is someone calls up and says there's this dog running around my neighborhood --

A Right.

Q -- and I want you to come and take care of it. And it's your job at that point to go, usually, and try

Q So instead of trying to grab the dog with your hands, you would hold the pole with your hands and try to slip the round noose part over the dog's --

A Neck.

Q -- snout or neck?

A Yes.

Q That's what you understand the purpose of it to be, correct?

A Yes.

Q But you've never had any training on how to use it, nor have you ever used it yourself; would that be fair?

A Correct.

Q Have you ever seen anyone use it?

A No.

Q These are present in all police vehicles?

A Well, yes. You got to realize, some squad cars don't have everything they should have. They should have one in there, all of them, but not necessarily they have all the equipment they should.

Q Okay. On January 8th of 2001, did the vehicle that you were in have one of these -- you called it a noose. Is that the technical term for this?

A I have no idea.

Q Okay. Let's call it a noose since that's what you called it. We'll call it that for today. Did the vehicle that you were in that day have a noose in it?

A No.

Q Where is it typically kept if it is in a squad car?

A Let me explain why I knew that car -- finish answering the question -- didn't have one. It was a spare car, which means a spare car is something we use when our regular car is in the shop downtown. So that car has very limited equipment.

Q If it is in a squad car, where is it?

A The trunk, it would be.

Q But you were certain that there was no such instrument in the car you were in on January 8th, 2001?

A Yes.

Q Had there been a noose in that vehicle, would you have tried to use it, do you think?

A No. Because the dog had a chain. He was attached to a chain. And I don't feel comfortable using it, so I wouldn't use it being I don't know how to use it.

Q Okay. You say the dog was attached to a chain. This is the dog on January 8th, 2001?

equipment on. And then we have to make sure our weapons -- weapons checked to make sure our weapons are okay, serviceable to use, if we have a round in the chamber and our magazines in, and all that.

Q So after that, then what happens?

A Then we go get our squad car keys, and then we start our shift.

Q Head out.

A Yeah.

Q And it was you and Officer Glick that day?

A Yes.

Q And you and he had known each other for how long?

A Probably at least a year.

Q And not every day, but you frequently were working with him?

A Yes. We worked together a lot.

Q And do you and him get along well?

A Very well. That's why they put us together a lot, because we liked working together.

Q Okay. So you and he get your keys, and you go off. Who typically drives, or does it go back and forth?

A That day he was driving, but it's not -- yeah, I mean, I drive sometimes too.

Q Okay. So that day he's driving, and what -- are you immediately sent off on a call somewhere, or do

you just take off driving around until you get a call that tells you to respond to something?

A I don't remember.

Q Okay.

A I don't remember that.

Q What time was it that you received a call -- strike that. Did you ever receive a call of a loose dog --

A No.

Q -- on that day? No?

A No.

Q Okay. How is it that you encountered the loose dog on January 8th, 2001?

A We had been driving on patrol in the area of Villard and 55th, going westbound when we saw the dog on the south side of the street, crossing the street into the median. And I was concerned about the dog.

Q What street was it that you saw him on, Villard?

A Yes.

Q All right. So you saw the dog on the south side of Villard, starting to walk across the street?

A North, he was going.

Q And is Villard a heavily traveled road?

A Yes. Very. That's why we stay on that street a

westbound or eastbound?

A It's two lanes. I'm sorry. It's two lanes. It's westbound, and we were in the right lane.

Q There's two westbound lanes. Are there also two eastbound lanes?

A Yes.

Q You were in the right lane of westbound Villard?

A Yes.

Q And he stopped there. Did he pull over to the side, or did he just stop in the lane?

A He just stopped.

Q Okay. So he stopped in the right lane. And then where was the dog in relation -- at that point where was the dog in relation to where you had stopped?

A By then he crossed completely over Villard and was headed on the north side of Villard headed north on 55th.

Q The dog was heading on the sidewalk, or the street?

A Sidewalk. He was on the east side of --

Q 55th?

A Yes.

Q Was the dog running, or walking, or how would you describe its movement?

A Walking, slowing. Like, slow trot.

Q Okay. What did you do once the car was stopped?
A I immediately got out real quick because I know if you don't catch a dog right away, it will be gone. It's hard to catch a dog when they're loose. I've tried a few times, maybe six, seven times. It's hard to catch a dog that's running loose.
Q So what was your intent when you got out of the car?
A To catch the dog and get it off the street so it wouldn't get hurt.
Q Okay. And is it pretty much your practice that whenever you see a dog with no person around it who is obviously in control of that dog that you will stop and try to catch that dog?
A Well, I can only remember one other occasion where I had that a dog was -- I stopped where it was running loose.
Q Is that the one you already told me about?
A No. This is another one. But I was with another female officer working that day, Vicki Peterson, and it was a Rottweiler, and we caught it. And I knew where the dog lived, so I knew the dog. I was familiar with the dog, and I knew it wasn't a vicious dog, and I caught it and brought it back to the owner.

A At least 6 to 8 foot.
Q Okay. Excuse me. And by this time you're already on 55th. You're not on Villard anymore, right?
A Just a little north of Villard. Maybe 10, 20 feet north of Villard.
Q And was your partner still in the car?
A Yeah. I think he was pulling over. I think he was pulling over to park the car because he stopped -- like I said, he just stopped.
Q Okay. So you grabbed the chain?
A Yeah, I grabbed the chain. And it was still walking north, and I grabbed it, and I started talking to the dog so it wouldn't be afraid of me. And I just stood there. I didn't go running after the dog. I said "Come here, come here dog." I got down, like kneeling.

And it started walking toward me like it was a happy dog. I thought, oh, this is going to be easy to get this dog. I thought, well, he's a good dog. He seemed like a good dog. He's walking slowly towards me. His body is moving like he's a happy dog. His tail's not down, or anything like that. Kind of wagging. He's just kind of walking towards me. He didn't bark or growl or nothing.
Q Okay. Had you ever had any experience working with

Q How big of a dog is this?
A Ninety pounds, maybe. Eighty-five, 90 pounds.
Q If it's standing on all fours, how tall to the top of his back?
MR. CERMELE: If you know.
THE WITNESS: I can't say. I don't remember.
BY MS. CAIN:
Q Did you recognize what kind of dog this was when you first saw it?
A Not right away, no.
Q When you grabbed its chain, did you recognize what breed of dog this was?
A I wasn't really thinking about that, I don't think.
Q It was a big dog though. It wasn't a poodle.
A Yeah. It wasn't a little dog. It was pretty big. But I'm used to big dogs. Like I said, I had Dobermans and Rottweilers. It doesn't mean that just because they're big they're mean. I got my present dog from the Humane Society and he's a big baby.
Q Okay. What happens next after the dog starts walking slowly towards you and you're holding its chain?
A I'm holding the chain with the left hand, and I

kind of kneeled down with my right hand, put my right hand out because I didn't want to scare the dog. I was going like this. Because I think if you go towards a dog like this, over the top of their head, you're going to scare them. So I went like this, and was talking to the dog in a calm manner trying to be cautious because I didn't want to scare him.

And he didn't seem vicious at all, not barking while I was talking to him. And he was sniffing my hand, sniffing, sniffing, sniffing, and I wasn't moving my hand or nothing.

Q All right. And then what happened?

A Then all of a sudden, which really shocked me, just all of a sudden he just jumped on me on this side of my body and just --

Q On your right side?

A Yeah. And just knocked me down is what it did, and latched onto my face.

Q Okay. Had you been squatting?

A Kind of squatting it would be, yes.

Q So he knocked you over?

A Knocked me on my back.

Q And then he bit you?

A Yeah. Just grabbed on my face.

Q And did he bite you more than once, or was it just once that he bit and then he let go?

A It was the once. He grabbed and he was holding on to my face, and I was on the ground like that. And I couldn't believe it because I thought a dog would growl or bark before they would attack. So I was trying to get my gun to get it off me, and I couldn't because he was right here.

Q He was right there meaning he was on my right shoulder?

A Yeah. Just all the weight was on my shoulder, and so I went with my left hand like this and I went, "No, get back," and I went like this and pushed the dog.

Q Pushed the dog in an outward motion with your left hand?

A Yeah. And then it got off me and just stood there looking at me.

Q Were you still holding on to the chain?

A At that point, no. Then I drew my gun and went like that, then I grabbed the chain.

MR. CERMELE: Can you just describe? You're making a lot of motions here, you took your gun and you went like that. For the record, you've got to tell us what you're doing, okay?

THE WITNESS: I'm sorry. I was able to get my gun at that point, and then I pointed it at the dog in case it would try to attack me again. Because I didn't want to shoot the dog. In case it attacked me again, then I would have to shoot at it because I was on the ground, laying. Then I grabbed the chain so I could hold on to the dog so the dog wouldn't get away.

BY MS. CAIN:

Q Where was your partner, Officer Glick, when this dog was biting you?

A I assume he was parking -- pulling the car over. And then after the incident, later on when I spoke to him, he had told me he was -- I didn't think he did. He didn't see the dog bite me. When he got out of the car, he saw me on the ground with the dog over top of me is what he said.

Q Okay. And after the dog -- after you pushed the dog away, did he just stand there and look at you?

MR. CERMELE: The dog, or Glick?

MS. CAIN: The dog.

THE WITNESS: Uh-huh, yeah. Just sat there looking at me, and never barked or growled or nothing. Didn't move. It just sat down and looked at me. I thought it was weird.

A Milwaukee --

MR. CERMELE: M-A-D --

THE WITNESS: Oh, okay.

BY MS. CAIN:

Q She has to type the word.

A Milwaukee Area Domestic Area Control Center.

MR. CERMELE: M-A-D-A-C-C.

THE WITNESS: Yeah. That's it.

BY MS. CAIN:

Q Okay. And you were then taken by ambulance from the scene to a hospital, correct?

A Yes.

Q Which hospital was it?

A St. Mike's.

Q You were treated in the emergency room there?

A Yes.

Q Did you have to spend an overnight at the hospital?

A No.

Q You were given -- you had stitches then?

A Thirty stitches.

Q And how many cuts or puncture wounds or lacerations did you have?

A Three.

Q Three?

A Three, yes.

Q And you had a total of 30 stitches?
A Yes.
Q Describe where the stitches were.
A In the right earlobe. It was that part about -- you could still see a line there where he about ripped that earlobe off, the right earlobe. Then I had one very close to the carotid artery of the right side, and then just a little below on the jawline on the right side.
Q All right. And you currently have three scars in those three places?
A Yes.
Q Okay. We're going to go off the record for a minute so that I can come a little closer, if you don't mind, and look at your scars.
A Okay.

MS. CAIN: Let's go off the record.

(Discussion off the record.)

BY MS. CAIN:

Q I've now had an opportunity to view those scars, and I think we agreed, and you can correct me if I'm wrong, but the scar on your earlobe is in the shape of a half-moon, and it's a little below where your ear is pierced, correct?
A Correct.

CHAPTER 78
ANIMALS

TABLE

78-1. Definitions. In this chapter:

1. ANIMAL FANCIER means any person in a residential dwelling unit who keeps, harbors, raises or possesses any combination of dogs or cats numbering not less than 4 nor more than 5 animals over the age of 5 months.

2. APPROVED means approved by the commissioner.

3. AT LARGE means an animal is off the premises of its owner and on any public street or alley, school grounds, a public park, or other public grounds or on private property without the permission of the owner or person in lawful control of the property. An animal shall not be deemed to be at large if:

a. It is attached to a leash not more than 6 feet in length which is of sufficient strength to restrain the animal and the leash is held by a person competent to govern the animal and prevent it from annoying or worrying pedestrians or trespassing on private property or trespassing on public property where such animals are forbidden; or

b. It is properly restrained within a motor vehicle; or

c. It is a dangerous animal that is in compliance with the requirements of s. 78-23-2.

4. BODILY HARM means physical pain or injury or any impairment of physical condition.

5. CARETAKER means any person 16 years of age or older who, in the absence of the owner, temporarily harbors, shelters, keeps or is in charge of a dog, cat or any other domesticated bird or animal.

6. CAT means a domesticated member of felis domestica.

7. COMMISSIONER means the commissioner of health, his or her designated representative within the health department, or any other city official to whom the commissioner's functions or duties under this chapter have been delegated pursuant to a memorandum of understanding.

8. COMMISSIONER OF PUBLIC WORKS means the legally designated head of the department of public works of the city of Milwaukee or his or her authorized representative.

9. DANGEROUS ANIMAL means:

a-1. Any animal which, when unprovoked, bites or otherwise inflicts bodily harm on a person, domestic pet or animal on public or private property.

a-2. Any animal which chases or approaches a person in a menacing fashion or apparent attitude of attack without provocation upon the streets, sidewalks or any public grounds or on private property without the permission of the owner or person in lawful control of the property.

a-3. An animal with a known propensity, tendency or disposition to attack, to cause injury to, or to otherwise threaten the safety of humans or other domestic pets or animals.

b. The biting or injury of a person by an animal shall in the absence of contrary evidence be presumed to be due to an unprovoked attack. Provocation of the animal by the person or animal that is bitten or injured or the fact that the animal bit or injured another person or animal as a result of provocation shall be considered in mitigation and if the provocation is purposeful or substantial, the court may accept the alleged bite or injury as self-defense by the animal and not classify the animal as dangerous.

c. An animal shall not be deemed a dangerous animal if it bites, attacks or menaces any person or animal to:

c-1. Defend its owner, caretaker or another person from an attack by a person or animal.

c-2. Protect its young or another animal.

c-3. Defend itself against any person or animal which has tormented, assaulted or abused it.

c-4. Defend its owner's or caretaker's property against trespassers.

9.5. DEPARTMENT means the health department or any department to which health department functions or duties under this chapter have been delegated pursuant to a memorandum of understanding.

10. DOG means a domesticated member of canis familiaris.

11. DOMESTICATED ANIMAL means any bird or animal of any species which usually lives in or about the habitation of humans as a pet or animal companion. The term does not include a dangerous animal or a prohibited dangerous animal.

12. DWELLING UNIT means one or more rooms, including a bathroom and kitchen facilities, which are arranged, designed or used as living quarters for one family or household.

13. FOWL means all domesticated birds and nondomesticated game birds ordinarily considered to be edible.

14. GROOMING means care or service provided to the exterior of an animal to change its looks or improve its comfort but does not mean the treatment of physical disease or deformities.

15. GROOMING ESTABLISHMENT means a business establishment in which a domesticated bird or animal is received for grooming.

16. KENNEL means a profit or nonprofit business establishment in which more than 3 dogs or 3 cats, or any combination thereof, over the age of 5 months may be kept for boarding, breeding, safekeeping, convalescence, humane disposal, placement, sale or sporting purposes.

17. MULTIPLE DWELLING means a commercial or residential building consisting of 3 or more dwelling units.

18. OWNER means any person owning, harboring, sheltering or keeping a dog, cat or any other domesticated bird or animal.

19. PERSON means any individual, firm, corporation or other legal entity.

20. PET SHOP means a business establishment, other than a kennel, where domesticated mammals, birds, fish or reptiles are kept for sale.

21. PIT BULL means any dog which is one-half or more American staffordshire terrier, staffordshire terrier, American pit bull terrier, miniature bull terrier or staffordshire bull terrier.

22. PROHIBITED DANGEROUS ANIMAL means:

a. Any animal that is determined to be a prohibited dangerous animal under s. 78-25.

b. Any animal that, while off the owner's or caretaker's property, has killed a domestic pet or animal without provocation.

c. Any animal that, without provocation, inflicts substantial bodily harm on a person on public or private property.

d. Any animal brought from another city, village, town or county that is described under s. 78-5-2-b.

e. Any dog that is subject to being destroyed under s. 174.02(3), Wis. Stats.

f. Any dog trained, owned or harbored for the purpose of dog fighting.

23. ROTTWEILER means any dog which is one-half or more rottweiler.

24. SUBSTANTIAL BODILY HARM means bodily injury that causes a laceration that requires stitches, any fracture of a bone, a concussion, a loss or fracture of a tooth or any temporary loss of consciousness, sight or hearing.

78-3. Owner or Caretaker's Duty; Presumption. 1. The owner or caretaker of any animal shall confine, restrain or maintain control over the animal so that the unprovoked animal does not attack or injure any person or domesticated animal.

2. The occupant of any premises on which a dog, cat or any other domesticated bird or animal remains or to which it customarily returns daily for a period of at least 10 days shall be presumed, for purposes of enforcement of this chapter, to be harboring, sheltering or keeping the animal.

78-5. Keeping of Animals Within City.

1. PERMITTED ANIMALS. No animal that is not a domesticated animal may be kept or brought into the city except as provided in s. 78-23 or as otherwise authorized by the commissioner.

2. CERTAIN ANIMALS PROHIBITED.

a. Except as otherwise provided in this chapter, no person shall keep within the city, either temporarily or permanently, any live bees, fowl, cows, cattle, horses, sheep, swine, goats, chickens, ducks, turkeys, geese or any other domesticated livestock, provided, however, that such animals or fowl may be kept at places approved by the commissioner for slaughtering, educational purposes, research purposes and for circuses or similar recreational events. Upon approval by the commissioner, horses used for livery service may be kept within the city. No rabbits or guinea pigs shall be kept within any portion of any multiple dwelling.

b. No person may bring into or keep in the city an animal that a Wisconsin city, village, town or county has declared dangerous or vicious, has banished from the city, village, town or county or has ordered to be destroyed. The commissioner may declare such an animal to be a prohibited dangerous animal in Milwaukee upon receipt of an official written declaration from the other city, village, town or county setting forth the grounds for the declaration, the name of the animal, if known, and the description of the animal.

c. No person may bring into or keep in the city, for sale or otherwise, either for food or for any other purposes whatsoever, any animal which, in accordance with the recommendations of the Compendium of Animal Rabies Control from the National Association of State Public Health Veterinarians, Inc., is not able to be effectively vaccinated against rabies, or any animal dead or alive, bird, insect, reptile or fish which is otherwise dangerous or detrimental to health.

3. NUMBER PERMITTED. No person may keep, harbor, shelter or possess at any time more than 3 dogs or cats or any combination thereof which are over the age of 5 months unless the person holds a valid animal fancier permit, kennel permit, pet shop permit or grooming establishment permit. The keeping of more than 3 dogs or cats over the age of 5 months per dwelling unit in a multiple dwelling is declared to be a nuisance. No person in a multiple dwelling shall be granted an animal fancier permit. There shall be no more than one animal fancier permit issued to any qualified dwelling unit.

4. ANIMAL REMOVAL. The department or the humane society may confiscate and remove animals from a premises for violation of subs. 1, 2 or 3 or ss. 78-23, 25 and 31. The department may convey such animals to the humane society to be housed and handled appropriately. If necessary, such animals may be disposed of in a humane manner by the department, humane society or their designee.

78-7. Kennels, Horse Stables and Animal Fancier Permits. 1. KENNELS AND HORSE STABLES. a. Permit Required. No person shall operate a kennel or horse stable without a valid permit issued by the commissioner. When all applicable provisions of this section along with applicable federal and state of Wisconsin requirements have been complied with by the applicant and a valid occupancy permit for this business has been issued by the commissioner of city development, the commissioner shall issue a permit to operate upon payment of the fee required in s. 60-51.

b. Kennels; Operation. Kennels shall be operated in accordance with the following requirements:

b-1. All animals shall be maintained in a healthy condition, or if ill shall be given appropriate treatment immediately.

b-2. The quarters in which the animals are kept shall be maintained in a clean condition and in a good state of repair.

b-3. Animal pens or enclosures shall be large enough to provide freedom of movement to the animals contained therein and shall be constructed of nonporous and noncorrosive materials. Dogs and cats over the age of 5 months shall be housed in separate

enclosures with enough space as set by applicable federal requirements with no more than 3 dogs or 3 cats contained within the same enclosure. Animals shall not have the freedom to roam the business establishment.

b-4. Food supplies shall be stored in rodent-proof containers and food and water containers shall be kept clean.

b-5. Litter or bedding material shall be changed as often as necessary to prevent an odor nuisance.

b-6. Feces shall be removed from yards, pens and enclosures at least daily and stored in tightly covered metal containers until final disposal.

b-7. Yards, pens, premises and animals shall be kept free of pest infestations.

b-8. No odor nuisance shall be permitted. Any animal holding area containing animals shall be provided with fresh air by means of windows, doors, vents, exhaust fans or air conditioning so as to minimize drafts, odors and moisture condensation.

b-9. Kennels shall also be operated in accordance with requirements set forth in s. 78-9-3 to 5. Nothing in this section shall apply where kennel services are incidental to the operation of a veterinary hospital.

c. Horse Stables; Operation. Horse stables shall, in addition to the requirements set forth in sub. b-1, 2, 4 to 8 and s. 78-5, be operated in accordance with the following:

c-1. Horse stalls or enclosures shall be large enough to provide freedom of movement to the animals contained therein and shall be constructed of such materials and in such a manner as to comply with all local, state and federal requirements.

c-2. Horses shall be stabled indoors.

c-3. The temperature of the stable shall comply with all local, state and federal animal welfare regulations.

c-4. An approved water supply shall be provided to all parts of the stable for the horses and to be used for wet cleaning.

c-5. Floor drains connected to an approved sewage system must also be provided.

2. ANIMAL FANCIER PERMITS.

a. The commissioner shall issue an animal fancier permit upon the payment of all applicable fees required in s. 60-3, provided that the owner has no outstanding violations under this chapter.

b-1. Whenever the department requests an inspection of the interior and exterior premises of a person holding an animal fancier permit or of an applicant for an animal fancier permit, the animal fancier or applicant shall schedule such an inspection and allow the inspection to be completed no later than 10 days after the date of the request. A request for a department inspection under this paragraph may be made by any of the following means:

b-1-a. An oral request delivered in person to the applicant or permit holder.

b-1-b. An oral request delivered by telephone to the applicant or permit holder.

b-1-c. A written request left at the residence or place of occupation of the applicant or permit holder.

b-1-d. A written request delivered to a competent adult occupant of the applicant's or permit holder's residence.

b-1-e. A written request addressed to the applicant or permit holder at his or her residence and mailed by first class, prepaid mail.

b-2. A person who fails to comply with an inspection request as required by this paragraph shall be charged a delayed inspection fee in the amount provided in s. 60-3-4.

c. A person holding an animal fancier permit shall conform to the requirements set forth in sub. 1-b-1 to 8.

d. An animal fancier permit may be revoked if an owner does not conform to the requirements set forth in sub. 1-b-1 to 8.

78-9. Pet Shops. 1. PERMIT REQUIRED. No person may operate a pet shop unless the person holds a valid permit issued by the commissioner. When all applicable provisions of this section have been complied with by the applicant and a valid occupancy permit for this type of business has been issued by the commissioner of city development, the commissioner shall issue a permit to operate a pet shop upon the payment of the fee required in s. 60-69.

2. OPERATION. Pet shops shall be operated in accordance with the requirements set forth in s. 78-7-1-b-1 to 8.

3. IMMUNIZATION. No pet shop may sell or offer for sale any dog or cat 5 or more months old unless the dog or cat has been vaccinated against rabies by use of a vaccine currently licensed by the U.S. department of agriculture. The vaccine shall be

administered by or under the supervision of a licensed veterinarian. A certificate of vaccination identifying the dog or cat including its approximate age, date of vaccination and signed by the vaccinating veterinarian shall be given the purchaser at the time of sale.

4. RECORD OF SALE. Every pet shop shall keep a record of every dog and cat sold by the establishment setting forth the date and source of acquisition, date of rabies vaccination, the date of sale and the name and address of the purchaser. Such records shall be maintained on the pet shop premises for at least one year following the date of sale of each dog and cat, and such records shall be open to inspection by the commissioner at all times during which the pet shop is open to the public.

5. SALE OF BATS, FOXES, RACCOONS AND SKUNKS PROHIBITED. No pet shop may engage in the purchase, keeping, distribution or sale of any species of bats, foxes, raccoons or skunks.

78-11. Grooming Establishments. 1. PERMIT REQUIRED. No person may operate a grooming establishment without a valid permit issued by the commissioner. When all applicable provisions of this section have been complied with by the applicant and a valid occupancy permit for this business has been issued by the commissioner of city development, the commissioner shall issue a permit to operate a grooming establishment upon the payment of the fee required in s. 60-43.

2. OPERATION. Animal grooming establishments shall, in addition to the requirements set forth in s. 78-7-1-b-2, 3 and 8, be operated in accordance with the following:

a. The floor of any room in which grooming operations are conducted or in which animals are kept shall be covered with an impervious, smooth, cleanable surface. The floors shall be cleaned and disinfected daily.

b. All animal hair and manure shall be removed from the floors daily and shall be stored in tightly covered, waterproof containers in such a manner as to prevent a nuisance until the final disposal.

c. In each grooming establishment that uses a bathtub, such bathtub shall be large enough to accommodate the largest animal groomed. The tub shall be made of approved material and shall be properly connected to an approved water system consisting of hot and cold running water and to an approved sewer or waste disposal system.

d. No animals shall be kept in any grooming establishment other than during regular office hours unless a valid kennel or pet shop permit is also issued for the same location. Nothing in this section shall apply to an establishment where grooming is incidental to the operation of a veterinary hospital.

e. The premises shall be kept free of insect and rodent infestation.

f. The premises shall be maintained and operated in a nuisance free manner.

78-13. Posting of Permit. Every kennel, pet shop or grooming establishment permit issued by the commissioner shall be posted in a conspicuous place open to the public.

78-15. Sanitary Conditions of Commercial Animal Establishment. All commercial kennels, hutches, runs, yards or any other commercial structures or premises where animals permitted to be kept in accordance with this chapter are housed or kept shall be maintained in a clean and sanitary condition.

78-17. Dog and Cat Licenses. 1. REQUIRED. Any person owning, keeping, harboring or having custody of any dog or cat over 5 months of age within the city of Milwaukee must obtain a license as provided in this section and in accordance with ch. 174, Wis. Stats., relating to dogs, and ch. 26, Milwaukee County Code of Ordinances, relating to cats. Any person obtaining a dog or cat that is older than 5 months of age shall have 30 days to apply for an original license, except this requirement will not apply to a nonresident keeping a dog or cat within the city for less than 30 days.

2. APPLICATION. Application for licenses shall be made to the city treasurer and shall include the name and address of the applicant, description of the animal, the appropriate fee, whether the animal is spayed or neutered and a rabies certificate or tag issued by a licensed veterinarian illustrating that the animal for which the license is sought has received current immunization for rabies or a statement issued by a licensed veterinarian that the immunization for rabies is contraindicated for the animal. A rabies certificate or tag shall be deemed valid if the termination date of the immunization falls after the date of the application for the license. Written proof is required from a licensed veterinarian that the animal being licensed has been spayed or neutered in order to qualify for a reduced license fee.

3. FEES. A license shall be issued after payment of the fee specified in s. 60-7.

4. PAYMENT RESPONSIBILITY. The owner, harborer, shelterer or head of the family shall be liable for payment of the license fee of any dog or cat owned, harbored or kept by any member of the family.

5. ISSUANCE. Upon acceptance of the license application and fee, the city treasurer shall issue a tag and a license. The tag shall be securely attached by the licensee to a collar or harness and the collar or harness with the tag attached shall be kept on the dog or cat for which the license is issued at all times. This requirement does not apply to a dog or cat securely confined indoors or in a fenced area.

78-19. Animals at Large; Animal Litter Nuisance. 1. UNLAWFUL. No owner or caretaker of any animal may permit or suffer the animal to be at large. Any animal found at large shall be deemed to be so with the permission or at the sufferance of its owner or caretaker. Any adult person alone or together with other adults may seek relief from animals at large by a complaint to the commissioner setting forth the specific date and approximate time an animal of a particular owner was observed by them to be at large. The commissioner shall notify the owner or caretaker of the animal, in writing, of the alleged violation and provisions of this section. If the petitioners subsequently observe that the animal is again at large, they may submit a written petition to the city attorney for commencement of prosecution to obtain compliance with this section. Such written petition shall contain:

a. Name and address of complainant.

b. Description of animal and address of owner.

c. Dates and times violations were noted.

d. Date reported to commissioner.

e. Statement that petitioners will be willing to sign complaint and testify in court.

2. SETTING AT LARGE. No person may permit an animal to run at large by opening any door or gate of any premises or loosen any restraining device or otherwise entice any animal to leave any place of confinement.

3. ANIMAL LITTER NUISANCE. No owner or caretaker of any animal may appear with the animal on any street, alley, sidewalk, lawn, field or any public property or upon a property other than their own without a shovel, scoop, bag or other items for the removal of fecal matter. The owner or caretaker of an animal shall immediately after deposit of fecal matter on such premises remove all fecal matter by shovel, scoop, bag or other item and properly wrap and deposit the fecal matter in an approved waste container as specified in s. 79-4 situated upon his or her own premises.

4. COMPLAINTS. Any adult person alone or together with other adults may seek relief from animal fecal matter deposits as described in sub. 3 by a complaint to the commissioner in the same manner and procedure as set forth in sub. 1.

78-21. Impounding of Animals.

1. IMPOUNDING. Any police officer or humane officer finding an animal at large may seize the animal and impound it in the place designated by the commissioner. The commissioner may also cause the seizure and impoundment of animals at large.

2. REPOSSESSION. The possession of any animal so seized or impounded may be obtained by the owner upon payment of the fee required in s. 60-5 plus the current daily fee for keeping such animal for each calendar day or fraction thereof during which the animal has been impounded. The possession of an unlicensed dog or cat may be obtained by the owner after he or she obtains the required license and pays the specified impoundment and daily fee for keeping the dog or cat.

78-22. Pit-Bull and Rottweiler Dogs.

1. OWNER RESPONSIBILITIES. The owner of any pit bull dog, as defined in s. 78-1-21 or any rottweiler dog, as defined in s. 78-1-23 shall comply with all of the following:

a. While leashed, the leash shall be held by a person 16 years of age or older, who is competent to govern the animal. The leash may be held by a person younger than 16 years of age upon prior written approval of the department of neighborhood services or when shown in a sanctioned American Kennel Club show or other organized competition among trained owners and dogs. The written approval shall be carried by the person younger than age 16.

b. Have a fenced yard or kennel area which is of a height sufficient to contain the dog and is a minimum of 3 feet from any public street, sidewalk or alley. The fencing material shall be of a material which cannot be climbed by a dog and be set a minimum of 12 inches into the ground. The kennel area shall have a concrete floor.

c. Attend a minimum of one dog behavior or training class per year offered by a trainer recommended by the Wisconsin Humane Society, the Milwaukee Dog Training Club or the Cudahy Kennel Club.

2. AT LARGE. No pit bull or rottweiler dog shall be at large, in violation of s. 78-19-1 or 2.

3. DEFENSE. The owner shall be responsible for presenting proof of a dog's breeding as a defense for failure to comply with the section.

78-23. Harboring Dangerous Animals.

1. DANGEROUS ANIMALS REGULATED. a. No person may harbor or keep a dangerous animal within the city unless all provisions of this section are complied with. Any animal that is determined to be a prohibited dangerous animal under s. 78-25-2 shall not be kept or harbored in the city.

b. The commissioner may determine an animal to be a dangerous animal whenever the commissioner finds that an animal meets the definition of a dangerous animal in s.78-1-9.

c. The issuance of a citation for a violation of this section need not necessarily be predicated on a determination by the commissioner that an animal is a dangerous animal.

2. LEASH AND MUZZLE. No person owning, harboring or having the care of a dangerous animal may permit such animal to go outside its kennel or pen unless the animal is securely leashed with a leash no longer than 4 feet in length. No person may permit a dangerous animal to be kept on a chain, rope or other type of leash outside its kennel or pen unless a person who is 16 years of age or older, competent to govern the animal and capable of physically controlling and restraining the animal is in physical control of the leash. The animal may not be leashed to inanimate objects such as trees, posts and buildings. A dangerous animal on a leash outside the animal's kennel shall be muzzled in a humane way by a muzzling device sufficient to prevent the animal from biting persons or other animals. A dangerous animal shall not be required to be muzzled upon prior written approval of the health department or when shown in a sanctioned American Kennel Club show. The written approval shall be carried by the owner or caretaker.

3. CONFINEMENT. a. Except when leashed and muzzled as provided in sub. 2, all dangerous animals shall be securely confined indoors or in a securely enclosed and locked pen or kennel that is located on the premises of the owner or caretaker and constructed in a manner that does not allow the animal to exit the pen or kennel on its own volition.

b. When constructed in an open yard, the pen or kennel shall, at a minimum, be constructed to conform to the requirements of this paragraph. The pen or kennel shall be child-proof from the outside and animal-proof from the inside. A strong metal double fence with adequate space between fences (at least 2 feet) shall be provided so that a child cannot reach into the animal enclosure. The pen, kennel or structure shall have secure sides and a secure top attached to all sides. A structure used to confine a dangerous animal shall be locked with a key or combination lock when the animal is within the structure. The structure shall either have a secure bottom or floor attached to the sides of the pen or the sides of the pen shall be embedded in the ground no less than 2 feet. All structures erected to house dangerous animals shall comply with all city zoning and building regulations. All structures shall be adequately lighted and ventilated and kept in a clean and sanitary condition.

4. CONFINEMENT INDOORS. No dangerous animal may be kept on a porch, patio or in any part of a house or structure on the premises of the owner or caretaker that would allow the animal to exit the building on its own volition. No dangerous animal may be kept in a house or structure when the windows are open or when screen windows or screen doors are the only obstacle preventing the animal from exiting the structure.

5. SIGNS. The owner or caretaker of a dangerous animal shall display, in prominent places on his or her premises near all entrances to the premises, signs in letters of not less than

2 inches high warning that there is a dangerous animal on the property. A similar sign is required to be posted on the kennel or pen of the animal. In addition, the owner or caretaker shall conspicuously display a sign with a symbol warning children of the presence of a dangerous animal.

6. SPAY AND NEUTER REQUIREMENT. Within 30 days after an animal has been designated dangerous, the owner or caretaker of the animal shall provide written proof from a licensed veterinarian that the animal has been spayed or neutered.

7. LIABILITY INSURANCE. The owner or caretaker of a dangerous animal shall present to the department or police department proof that the owner or caretaker has procured liability insurance in an amount not less than $1,000,000 for any personal injuries inflicted by the dangerous animal. Whenever such a policy is cancelled or not renewed, the insurer shall so notify the department.

8. WAIVER BY COMMISSIONER. Upon request, the commissioner may waive any requirement specified in subs. 2 to 7 that the commissioner deems to be inappropriate for a particular dangerous animal.

9. APPEAL. Upon investigation, a department or humane officer may issue an order declaring an animal to be a dangerous animal. Whenever an owner or caretaker wishes to contest an order, he or she shall, within 72 hours after receipt of the order, deliver to the department a written objection to the order. If an owner or caretaker makes such an objection to the order, the department shall convene a hearing before a dangerous animal panel. The procedure for such appeal and the composition of the panel shall all be as specified ins. 78-25.

10. NOTIFICATION. The owner or caretaker shall notify the department or police department within 24 hours if a dangerous animal is at large, is unconfined, has attacked another animal or has attacked a human being, has died, has been sold or has been given away. If the dangerous animal has been sold or given away, the owner or caretaker shall also provide the department or police department with the name, address and telephone number of the new owner of the dangerous animal. If the dangerous animal is sold or given away to a person residing outside the city, the owner or caretaker shall present evidence to the department or police department showing that he or she has notified the police department or other law enforcement agency of the animal's new residence, including the name, address and telephone number of the new owner of the dangerous animal.

11. EUTHANASIA. If the owner or caretaker of an animal that has been designated a dangerous animal is unwilling or unable to comply with the regulations for keeping the animal in accordance with this section, he or she may have the animal humanely euthanized by an animal shelter, the humane society or a licensed veterinarian.

12. WAIVER. The commissioner may waive the provisions of subs. 2 to 7 for a law enforcement or military animal upon presentation by the animal's owner or handler of a satisfactory arrangement for safe keeping of the animal.

78-25. Prohibited Dangerous Animals.

1. NOT ALLOWED IN CITY. No person may bring into or keep in the city any animal that is a prohibited dangerous animal under this section.

2. DETERMINATION OF A PROHIBITED DANGEROUS ANIMAL. a. The commissioner may determine an animal to be a prohibited dangerous animal whenever the commissioner finds that an animal meets the definition of a prohibited dangerous animal in s. 78-1-22 or is a dangerous animal in non-compliance with any of the provisions of s. 78-23.

b. Upon investigation, a department or humane officer may issue an order declaring an animal to be a prohibited dangerous animal. Whenever an owner or caretaker wishes to contest an order, he or she shall, within 72 hours after receipt of the order, deliver to the department a written objection to the order. The written objection shall include the specific reasons for objecting to or contesting the order. If an owner or caretaker makes such an objection to the order, the department shall convene a hearing. The hearing shall be conducted before a 3-person dangerous animal panel composed of a representative of the city clerk's office who works in community services, to be designated by the city clerk, a humane officer or his or her designee and a veterinarian selected by the Milwaukee County veterinary society. Each panel member serves

as an officer of the city exercising a quasi-judicial function within the scope of s. 893.80, Wis. Stats. At the hearing, the owner or caretaker shall have the opportunity to present evidence as to why the animal should not be declared a prohibited dangerous animal. The hearing shall be held promptly and within no less than 5 days nor more than 10 days after service of a notice of hearing upon the owner or caretaker of the animal.

c. Pending the outcome of the hearing, the animal must be securely confined in a humane manner either on the premises of the owner or caretaker or with a licensed veterinarian. The commissioner may order impoundment of the animal pending the result of the hearing.

d. After the hearing, the owner or caretaker shall be notified in writing of the panel's determination. If a determination is made that the animal is a prohibited dangerous animal, the owner or caretaker shall comply with sub. 1 in accordance with a time schedule established by the commissioner or chief of police, but in no case more than 30 days after the date of the determination. If the owner or caretaker further contests the determination, he or she may, within 5 days of receiving the panel's decision, appeal the decision to the administrative review appeals board.

3. DESTRUCTION. Any dog that has caused bodily harm to a person or persons on 2 separate occasions off the owner's premises, without reasonable cause, may be destroyed as a result of judgment rendered by a court of competent jurisdiction, as specified under s. 174.02(3), Wis. Stats. The city attorney may petition an appropriate court to obtain a court order to destroy such a dog.

4. ENFORCEMENT. The department and police department may make whatever inquiry is deemed necessary to ensure compliance with this section.

5. WAIVER. The commissioner may waive the provisions of this section for a law enforcement or military animal upon presentation by the animal's owner or handler of a satisfactory arrangement for safe keeping of the animal.

78-27. Control of Rabid Animals. 1. The owner of any animal which has contracted rabies or which has been exposed to rabies or which is suspected of having rabies or which has bitten any person and is capable of transmitting rabies shall upon demand of the police department or commissioner produce and surrender the animal to the police department or commissioner to be held in quarantine in a place designated by the commissioner for observation for a period of time determined by the commissioner.

2.a. If, upon investigation by the commissioner an animal other than a dog or cat has bitten a person or appears to be infected with rabies, the animal may be destroyed as directed by the commissioner, in accordance with s. 95.21(4)(b), Wis. Stats.

b. If, upon investigation by the commissioner and a determination by a veterinarian that a dog or cat exhibits symptoms of rabies, the dog or cat may be destroyed as directed by the commissioner, who shall act in accordance with s. 95.21(5)(d), Wis. Stats.

3. No person may knowingly harbor or keep any animal infected with rabies or any animal known to have been bitten by a rabid animal.

78-29. Animals; Disturbing the Peace.

1. COMPLAINTS. No person may own, keep, have in his or her possession or harbor any bird or animal which by frequent and habitual howling, yelping, barking or otherwise shall cause serious annoyance or disturbance to persons in the neighborhood. No prosecution may be commenced except upon the request of the commissioner following written complaint signed by one or more affected adult persons. No persons may be convicted under the provisions of this section except upon testimony of one or more adult persons.

2. CITATIONS. Notwithstanding sub. 1, enforcement personnel from the department and the police department may utilize a citation to help obtain relief from animal annoyances. In such instances, a notice shall be issued to the owner or caretaker of the animal producing the alleged nuisance specified by the complainant. Following issuance of such notice and where subsequent complaints are received of an alleged continued nuisance, the designated enforcement agencies may attempt to verify the reported animal nuisance. Where such verification is accomplished, these enforcement personnel may issue or cause to be issued a citation in accordance with other provisions of this chapter on the owner or caretaker of the animal causing the disturbance.

78-31. Cruelty to Animals. 1. CRUELTY. a. No person may cause, allow or personally beat, frighten, overburden or abuse any animal or bird, or use any device or chemical substance by which pain, suffering or death may result, whether the animal belongs to the person or another, except that reasonable force may be used to drive off dangerous or trespassing animals.

b. No person shall abandon or transport any animal or bird in a cruel manner.

2. FOOD AND WATER. No person owning or having custody of any animal or bird may neglect or fail to provide it with necessary nourishing food at least once daily and provide a constant supply of clean water to sustain the animal or bird in good health.

3. SHELTER. a. No person may fail to provide any animal or bird in his or her charge with shelter from inclement weather to insure the protection and comfort of the animal or bird.

b. When sunlight is likely to cause overheating or discomfort to any animal or bird, shade shall be provided by natural or artificial means to allow protection from the direct rays of the sun.

c. Dogs and cats kept outdoors for more than one hour at a time shall be provided with moistureproof and windproof shelter of a size which allows the animal to turn around freely and to easily sit, stand and lie in a normal position and to keep the animal clean, dry and comfortable. Whenever the outdoor temperature is below 40° F, clean, dry bedding material in quantity and type approved by a duly appointed humane society officer shall be provided in such shelters for insulation and to retain the body heat of the animal. Automobiles shall not be used as animal shelters.

4. LEASHES. Chains, ropes or leashes shall be placed or attached so that they cannot be entangled with another animal or object and shall be of sufficient length in proportion to the size of the animal to allow the animal proper exercise and convenient access to food, water and shelter. A leash shall be located so as not to allow an animal to trespass on public or private property nor in such a manner as to cause harm or danger to persons or other animals.

5. ANIMAL FIGHTING. a. Instigation. No owner or caretaker of any animal shall cause or allow any animal to lunge at, or fight any other animal or person.

b. Veterinary care. No owner of caretaker of any animal which has attacked or fought with another animal or person shall fail to get prompt veterinary care for the animal if the animal is bleeding or injured, and shall provide a copy of a current dog license upon request.

78-33. Nuisance Birds. Starlings, English sparrows and feral pigeons are declared a public nuisance and may be trapped or destroyed under the supervision of the commissioner subject to applicable federal and state regulations.

78-35. Bird Feeding. Feed for birds shall be placed in a covered hopper, gravity type feeder. The platform of the feeders shall be of reasonable size and surrounded by a ledge to deter food from blowing off. The feeder shall be placed on top of a rodent-proof pole which extends at least 3.5 feet above the ground and shall be placed at least 6 feet from the nearest climbable object, or the feeder may be suspended from a tree if protected by rodent guards. Feed for birds shall not be placed on the ground where it is accessible to rodents. No more than 4 bird feeders shall be located on any premises.

78-37. Pigeon Harborages. Whenever the owner or tenant of any property in the vicinity of a premises upon which there are pigeon harborages makes a complaint to the department of a feral pigeon nuisance and if a pigeon nuisance is found to exist, the commissioner shall order the owner or manager of the premises to make the premises reasonably pigeon-proof and when necessary cover openings with hardware cloth or other suitable material for preventing pigeons from entering in or upon the premises.

78-39. Selling Baby Fowls. No person may display, give away or sell baby chicks or ducklings or any other young of domestic or nondomestic fowl as pets or novelties.

78-41. Stuffed Animals; Preservatives. No person may sell dead, stuffed birds or animals as novelties which have been preserved with arsenic or any other substance toxic to humans.

78-43. Turtles. No person may sell live turtles with a carapace length of less than 4 inches as pets or novelties.

78-45. Giving Away Animals as Prizes. No person may raffle or give as a prize or premium any live animal.

78-47. Display of Birds in Food Establishments. No person may display birds of the psittacine family in any store selling, giving away or preparing food or drink for human consumption unless the birds are so enclosed as to prevent any possible contamination of the food or drink.

78-49. Removal of Dead Animals. Any person owning or having charge or control of any dead animal except those intended for food purposes shall remove the same from the city within 12 hours after the time of the death of the animal or shall request the commissioner of public works to remove and dispose of the animal. Any person who fails to do so shall relinquish all rights to any such animal and the commissioner may order the animal removed after the expiration of such time.

78-51. Disposal of Dead Animals and Condemned Meat Products. The commissioner of public works shall collect and dispose of all dead animals reported or found within the city, any fish, poultry or meat products which may be condemned by and ordered removed by the commissioner, and dead fish harvested by the harbor commission. Such collection and disposal may be provided by representatives of the commissioner of public works, or the commissioner of public works may cause the collection and disposal by private contractor. All collection and disposal shall be undertaken within 12 hours of notice and in a safe and sanitary manner satisfactory to the commissioner.

78-53. Conveyance of Dead Animals.

1. PARKING. No person may cause or allow any means of conveyance, including railway cars, used for the transport of dead animals, whether filled or partially filled, to remain at any point within the city for a period longer than 24 hours. No odor nuisance may be created by such parking.

2. SANITARY CONDITION. No person may cause or allow any conveyance or vehicle which is used for the transport of dead or live animals when the same is not in use to be stored or kept on any premises in the city unless the conveyance or vehicle has been cleaned, disinfected and deodorized or as may otherwise may be directed by the commissioner.

3. CONSTRUCTION. No person may use or cause to be used any conveyance or vehicle to carry or hold dead animals or animal refuse in the city, unless the conveyance or vehicle has watertight floors and sides and unless the conveyance or vehicle is constructed and arranged to shield its contents from view and prevent leakage or loss of contents or escape of odors.

78-55. Penalties and Enforcement.

1. BY ORDER. a. Whenever any violation of this chapter is found, the commissioner may issue a written order setting forth the character of the violation. This order may be served in any of the following ways:

a-1. Personally.

a-2. By posting in a conspicuous location on the premises where an animal is kept.

a-3. By mailing with an affidavit of the same to the operator of the establishment or place, or to a person responsible for a violation at his or her last known address.

a-4. By leaving a copy at his or her usual place of business with a responsible employe, or his or her usual place of abode in the presence of some competent member of the family at least 14 years of age, which employe or family member shall be informed of the contents of the order.

b. The order shall direct the person to correct such practices or conditions within a reasonable period of time to be determined by the commissioner. The order shall also state the potential legal or enforcement consequences if such practices or conditions have not been corrected within that period of time.

2. SUSPENSION OR REVOCATION OF PERMITS. a. Suspension. If at the end of a period of time set forth in an order, a reinspection by the commissioner reveals that the practices or conditions have not been corrected and such practices or conditions pose a potential threat to the health of persons exposed, the commissioner may notify the operator of the business or place of the commissioner's intent to suspend the permit and give such notice in writing to the operator and also the operator's right to a hearing and the request procedure. When the commissioner determines that existing conditions and violations pose an imminent and immediate and dangerous threat to the health of persons exposed to such conditions, the commissioner may order immediate suspension of a permit by written notification along with instructions on

the hearing procedure for review of such an action.

b. Revocation. The commissioner may serve written notice to an operator of the commissioner's intent to revoke a permit issued pursuant to this chapter and shall notify the operator of his or her right to a hearing prior to the action and the process for appeal. Grounds for the commissioner's intent to revoke a permit shall include any of the following:

b-1. The operator has a record of excessive, continuing or recurring violations.

b-2. The violations pose an immediate threat to the public's health or an imminent danger to other animals in the community and unsatisfactory action has been taken by the operator to eliminate the conditions.

b-3. A permit issued pursuant to this chapter has been suspended, and the corrections necessary for reinstatement of the permit have not been made within 6 months following notice of the suspension.

b-4. The operator or persons representing the operator have interfered with the lawful inspection or enforcement activities of the commissioner concerning the place of permit by physical abuse or denial of entry.

3. HEARING. Any person whose permit to operate an establishment or place regulated under this chapter has been suspended, or who has received notice from the commissioner that the permit is to be suspended unless existing conditions or practices at the establishment are corrected, or that the permit is to be revoked, may request and shall be granted a hearing on the matter before the commissioner. If no written petition for a hearing is filed in the office of the commissioner within 15 days following the day on which the notice was mailed or delivered, the permit shall be deemed to have been automatically suspended or revoked. Upon receipt of notice of permit suspension or revocation, the operator shall cease to operate the establishment. Upon receipt of petition for a hearing, the commissioner shall within 10 days notify the petitioner of the date, time and place of the hearing. Following the hearing the commissioner shall modify or withdraw the notice of permit suspension or revocation or shall suspend or revoke the permit, as in the commissioner's judgment is necessary to protect the public health, safety and welfare of the citizens of Milwaukee and shall notify the petitioner in writing of the decision.

4. APPEALS. Decisions of the commissioner may be appealed to the administrative review appeals board.

5. CITATIONS. The police department may issue citations for any violation of this chapter except that the police department may not determine an animal to be a prohibited dangerous animal under s. 78-25.

6. VIOLATIONS OF CERTAIN REGULATIONS. a. Any person violating any of the following provisions of this chapter listed in Column A for which specific penalties are not provided elsewhere in this subsection shall be liable on conviction to the penalties listed in column B and described in ch. 61:

A	B
78-3-1	Class I
78-5-1	Class F
78-5-2-a	Class C
78-5-2-b	Class L
78-5-2-c	Class F
78-5-3	Class C
78-7 to 78-19	Class C
78-22	Class F
78-23-1 to 78-23-7	Class F
78-23-10	Class I
78-25-1	Class K
78-27 to 31	Class F
78-35 to 47	Class C
78-49	Class F
78-53	Class F

b. b-1. Any person who commits a second or subsequent violation of s. 78-19-1 or who commits a second or subsequent violation of an order issued under s. 78-19-1 shall be liable upon conviction to a Class D penalty under ch. 61.

b-2. Any person who commits a first violation of s. 78-23-2, 78-23-3 or 78-23-4, or who commits a first violation of an order issued under s. 78-23-2, 78-23-3 or 78-23-4 that results in a dangerous animal being at large, shall be liable upon conviction to a Class I penalty under ch. 61.

b-3. Any person who commits a second or subsequent violation of s. 78-23-2, 78-23-3 or 78-23-4, or who commits a second or subsequent violation of an order issued under s. 78-23-2, 78-23-3 or 78-23-4 that results in a dangerous animal being at large, shall be liable upon conviction to a Class L penalty under ch. 61.

b-4. Any person who commits a violation of s. 78-23-1 that results in a dangerous animal causing bodily harm to a person shall be liable upon conviction to a Class L penalty under ch. 61.

b-5. Any person who commits a second or subsequent violation of s. 78-25-1 or who commits a second or subsequent violation of an order issued under s. 78-25-1 shall be liable upon conviction to a Class L penalty under ch. 61, each day of violation or noncompliance being a separate violation.

c. If a person continues in violation of an order, the person shall be liable for further prosecution, conviction and punishment upon the same order without the necessity of the commissioner issuing a new order.

7. CITATIONS. a. Citations may be issued for all violations listed in sub. 6 with or without a prior order or notice.

b. The stipulation, forfeiture and court procedure as set forth in s. 50-25 shall apply.

LEGISLATIVE HISTORY
CHAPTER 78

Abbreviations:
am = amended
cr = created
ra = renumbered and amended
rc = repealed and recreated
rn = renumbered
rp = repealed

Section	Action	File	Passed	Effective
Ch. 78	rc	85-1880	4/15/86	5/1/86
Ch. 78	rc	960684	9/24/96	10/11/96
78-1-2	am	980963	12/18/98	1/1/99
78-1-4-a	am	870882	5/16/89	6/3/89
78-1-7	rc	980963	12/18/98	1/1/99
78-1-8.5	cr	870882	5/16/89	6/3/89
78-1-9.5	cr	980963	12/18/98	1/1/99
78-1-12.5	cr	891875	2/27/90	3/21/90
78-1-19	am	871478	12/8/87	1/1/88
78-1-20	cr	870882	5/16/89	6/3/89
78-1-21	rn to 78-1-22	010558	1/22/2002	2/5/2002
78-1-21	cr	010558	1/22/2002	2/5/2002
78-1-22	rn to 78-1-24	010558	1/22/2002	2/5/2002
78-1-23	cr	010558	1/22/2002	2/5/2002
78-2-1	am	872295	3/8/88	3/25/88
78-2-2	am	940400	6/28/94	7/16/94
78-2-4	am	870882	5/16/89	6/3/89
78-3-1-a	am	872295	3/8/88	3/25/88
78-3-1-a	am	881803	1/24/89	2/11/89
78-3-1-b (title)	am	872295	3/8/88	3/25/88
78-3-1-c	cr	872295	3/8/88	3/25/88
78-3-2-a	am	881803	1/24/89	2/11/89
78-3-2-a	rc	951646	3/5/96	3/22/96
78-3-2-b	rn to 78-3-2-c	951646	3/5/96	3/22/96
78-3-2-b	cr	951646	3/5/96	3/22/96
78-4-1	am	881803	1/24/89	2/11/89
78-5-1	am	881803	1/24/89	2/11/89
78-5-1	am	980963	12/18/98	1/1/99
78-5-2-a	am	980963	12/18/98	1/1/99
78-5-2-c	am	961654	3/4/97	3/20/97
78-5-4	am	980963	12/18/98	1/1/99
78-7-1-a	am	980963	12/18/98	1/1/99
78-7-2-a	am	980963	12/18/98	1/1/99
78-7-2-b-1-0	am	980963	12/18/98	1/1/99
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78-7-2-d	cr	970562	7/25/97	8/13/97
78-8-3	am	881803	1/24/89	2/11/89
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78-11.5	cr	870882	5/16/89	6/3/89
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78-11.5-11-b	cr	891875	2/27/90	3/21/90
78-13	am	980963	12/18/98	1/1/99

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78-19-1-d	am	980963	12/18/98	1/1/99
78-19-4	am	980963	12/18/98	1/1/99
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78-23-1	rc	961654	3/4/97	3/20/97
78-23-1-c	cr	971256	12/16/97	1/8/98
78-23-2	am	010558	1/22/2002	2/5/2002
78-23-7	am	980963	12/18/98	1/1/99
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78-33	am	980963	12/18/98	1/1/99
78-37	am	980963	12/18/98	1/1/99
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78-55-3	am	980963	12/18/98	1/1/99
78-56-6-a	am	010558	1/22/2002	2/5/2002

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CHAPTER 22
POLICE AND FIRE DEPARTMENTS

TABLE

22-03. Police Force. 1. The police force of every city of the first class, however incorporated, shall consist of one chief of police, one inspector, one captain of detectives, and such number of captains of police, lieutenants, detectives, sergeants, roundsmen, patrolmen and other members as the common council shall from time to time by ordinance determine and prescribe.

2. In addition to the positions enumerated in sub. 1, the police force of the city of Milwaukee shall consist of and include the following positions, the number of which shall be determined by the salaries and positions ordinance:

a. Administrative assistants.
b. Deputy inspectors of police
c. Garage supervisor, assistant.
d. Garage supervisor, police.
e. Handwriting technician.
f. Jail matron.
g. Police alarm, assistant chief operator.
h. Police alarm, chief operator of.
i. Police communications, assistant superintendent of.
j. Police communications, superintendent of.
k. Police identification, superintendent.
l. Police identification, supervisor.
m. Police identification, technicians.
n. Police property and stores, custodian of.
o. Police property and stores, assistant custodian of.
p. Policewomen.
q. Radio mechanics.
r. Secretary of police department.
s. Traffic accident investigator.

3. All other positions in the police department shall constitute and be considered as civilian employe division of the police department without police powers.

4. All members or employes of the police department who are not members or employes of the police force shall be known as civilian employes or members of the police department.

5. All members or employes of the police force of the police department shall be known as police officers. *(S. 1, Ch. Ord. 150, Apr. 25, 1949.)*

22-04. Witness Fees. Any and all witness fees paid to any member or employe of the police department of the city of Milwaukee for attendance or testifying in any court where the information or knowledge testified to or sought to be elicited has been acquired by said member or employe of the police department in the performance of his official duty or employment, shall be immediately paid over by said member or employe to the chief of police who in turn shall pay over such witness fees to the city treasurer. All such witness fees received by the city treasurer shall be credited to the general city fund. *(S. 3, Ch. Ord. 49, Nov. 16, 1931.)*

22-05. Police Detail. The mayor or common council may direct the chief of police to detail any of the policemen to perform such official duties as he or they deem proper, and no extra compensation shall be allowed therefor. *(S. 3, Subch. 15, Ch. 184, L. 1874.)*

22-06. Rewards. Any and all property, money, gifts or things of value, other than salaries, received by the police department of the city of Milwaukee, or by any member or employe thereof, as reward or compensation in the

performance of official duties or special services in said department, shall become the property of the city of Milwaukee. All money so received or realized from any property so received shall be paid over by the chief of police to the city treasurer and all money so received by the city treasurer shall be credited to the general city fund. *(S. 3, Ch. Ord. 52, Jan. 25, 1932.)*

22-07. Police Powers of City Officers. The mayor, the harbor master and bridge tenders of the city, and the commissioner of health and his assistants, the meat inspector, and the special assistants appointed by said commissioner of health for quarantine service while engaged in such service, shall severally and respectively have and exercise, within said city, all the powers of policemen of said city, and the powers granted to the above mentioned shall be without any compensation or claim to compensation therefor. *(Am. Ch. Ord. 543, File #84-948, Nov. 13, 1984.)*

22-08. Police; Powers and Duties. The members of the police force shall perform such duties as shall be prescribed by the common council for the preservation of the public peace, and the good order and health of the city; they shall possess the powers of constables at common law; and all powers given to constables by the law of this state. The chief and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables; shall arrest with or without process and with reasonable diligence take before a magistrate or other proper court every person found in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city, and may within the county of Milwaukee execute all process issued by the courts of said county in criminal cases, but shall not serve civil process except when the city is a party. *(S. 26, Ch. Ord. 323, Oct. 21, 1966.)*

22-09. Authority Within the County. 1. EXTENDED. The authority of the police department of the city of Milwaukee, is hereby extended so as to embrace the county of Milwaukee, and policemen of said city shall have the like authority to make arrests and serve process within the county of Milwaukee as are now possessed by them within the city of Milwaukee.

2. BY MILWAUKEE COUNTY. In order to facilitate the transactions of business and performance of duty by policemen in the county of Milwaukee, beyond the limits of the city of Milwaukee, the county board of supervisors of the county of Milwaukee may supply the police department of the city of Milwaukee with sufficient authority and conveyance to travel through the county of Milwaukee. *(S. 1, 2, Ch. 204, L. 1875.)*

3. SERVICE AND RETURN OF PROCESS. The officers and members of the police force shall have authority to serve and return process returnable in any court in the county of Milwaukee, in cases in which the city of Milwaukee or the state of Wisconsin is plaintiff or prosecutor, with the same force and effect as the same may be done by the sheriff of said county or his deputies. *(S. 5, Ch. 308, L. 1882.)*

4. OFFICERS OF THE PEACE; PENALTY FOR DISOBEYING. The mayor or acting mayor, the sheriff of Milwaukee county, and each justice of the peace, policeman, constable and watchman, shall be officers of the peace and may command the peace, and suppress in a summary manner all rioting and disorderly behavior within the limits of the city; and for such purposes they may command the assistance of all bystanders, and, if need be, of all citizens and military companies; and if any person, bystander, military officer, or private, shall refuse to aid in maintaining the peace when so required each such person shall forfeit and pay a fine of fifty dollars and in cases where the civil power may be required to suppress riotous and disorderly behavior, the superior or senior officer present, in the order above mentioned in this section, shall direct the proceedings. *(S. 6, Subch. 15, Ch. 184, L. 1874, as affected by 1983 Wisconsin Act 210.)*

22-10. Charges Against Subordinates. 1. Charges may be filed against a subordinate by the chief, by a member of the fire and police commission, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed by the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

2. It is the intention of the common council that the procedures, processes, and trial under this section shall be conducted in the same manner as provided in s. 62.50, Wis. Stats. (1983). *(Ch. Ord. 341, File #68-453-b, June 25, 1968; formerly s. 21-14-2.)*

22-13. Fire Chief; Deputies. 1. Effective May 1, 1928, the position of first assistant engineer of the fire department of the city of Milwaukee be and hereby is abolished.

2. Effective May 1, 1928, there are hereby created two positions in the fire department of said city, each to be known as deputy chief engineer.

3. All appointments of deputy chief engineers, whether original or to fill a vacancy, shall be made by the chief engineer of the fire department, with the approval of the board of fire and police commissioners.

4. They shall be subject to suspension or removal in accordance with the laws and ordinances which may be applicable to the case of other members of the fire department at the time of such suspension or removal.

5. During the absence or disability of the chief engineer, or during a vacancy in that office, the deputy chief engineers shall in the order of their rank, have full power and authority and it shall be their duty to do all the acts required by law to be done by the chief engineer or imposed upon him by law or the ordinances of the city, and shall be subject to the same liabilities and penalties. This provision shall have reference to those duties which are required by law to be done by the chief engineer including ministerial acts only and the chief engineer shall have authority to assign any of the other duties of the department as he sees fit.

6. The rank of said deputy chief engineers shall be determined by the order in which their names are submitted by the chief engineer to the board of fire and police commissioners for approval. *(S. 1 thru 6, Ch. Ord. 26, Jan. 30, 1928.)*

22-14. Fire Department Organization. The common council shall have power to purchase fire engines and other fire apparatus, and to organize a fire department, composed of a chief engineer and such other officers and men as shall be required and employed in the management and conduct of such fire engines and apparatus, and to establish rules and regulations for such department. *(S. 23, Ch. Ord. 326, Nov. 29, 1966.)*

22-15. Fire Department Personnel. In addition to the officers and men now authorized to be employed in the fire department of the city of Milwaukee, including the assistant superintendent of fire-alarm telegraph, the superintendent of machinery and apparatus and the secretary now appointed and employed under ordinances of said city; and which several officers last named are hereby constituted and confirmed as officers of the department; there may also be appointed hereafter by the chief, with the approval of the board of fire and police commissioners, as provided by law, a third assistant engineer, a chief operator of fire-alarm telegraph and two assistant operators of fire-alarm telegraph. *(S. 1, Ch. 336, L. 1887.)*

[Pages 138 to 140 are blank]

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE

Plaintiff,

and

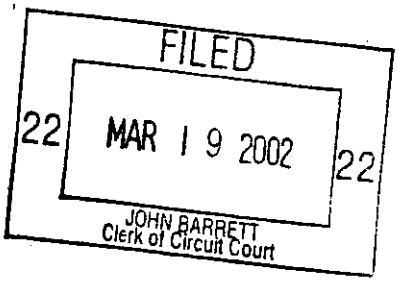
CITY OF MILWAUKEE

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

Defendants.



Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

AFFIDAVIT OF BRADLEY DEBRASKA
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN }
} ss.
MILWAUKEE COUNTY }

I, Bradley DeBraska, being duly sworn upon oath do state that:

1. I am the President of the Milwaukee Police Association and have served in that capacity since January of 1989.

2. Prior to being elected as President, I had served as a member of the Milwaukee Police Association's Executive Board beginning January of 1986; a position which I continue to hold as President.

3. I was appointed to the Milwaukee Police Department ("MPD") in 1977.

4. I make this affidavit in opposition to the defendants' Motion For Summary Judgment.

5. I have knowledge of the facts stated herein.

6. The primary purpose of Police Officers is the detection and prevention of crime, as well as the apprehension of criminals; the primary function of Police Officers is to further those purposes.

7. In June of 1977 the MPD stopped manning ambulances. After that date, Officers with the MPD no longer had, as one of their primary functions, the rescuing of citizens. Rather, that job was turned over to the Milwaukee Fire Department ("Fire Department"); the only exception being with the Underwater Investigative Unit (Scuba Team) which, upon information and belief, comprises approximately 10 members out of the current 2000 officers on the MPD.

8. MPD Officers are currently trained at the Police Safety Academy and, during such time, do not undergo any training pertaining to rescuing citizens.

9. MPD Officers currently receive only limited first aid training through the Safety Academy.

10. MPD Officers -- other than those few officers specifically assigned to the Underwater Investigative Unit (Scuba Team) -- are trained to contact the Fire Department or request an ambulance when coming in contact with an individual who is injured, in need of medical assistance, or needs to be rescued.

11. I am familiar with MPD issued Training Bulletins and am unaware of any such bulletin since 1977 which directed MPD Officers to provide medical attention (other than basic first aid) to injured individuals with whom they come in contact and who are either injured or in need of medical attention.

12. Likewise, I am unaware of any MPD issued Training Bulletins ever directing MPD Officers to take "rescue-type" action, other than those which may have been directed to the Underwater Investigative Unit (Scuba Team).

13. While MPD Officers may, in the course of their employment, occasionally enter into the "rescuer" mode, those situations are few and far between; such action is certainly neither an MPD Officer's primary function, nor one for which training is provided.

14. I am aware that, prior to Officer Cole's being attacked by the defendants' dog, she had occasion to catch a stray dog only 3-4 times during her 6 years with the MPD; a frequency which, in my opinion and based upon my experience with the MPD and the MPA, is typical.

15. Although Police Officers do have an obligation under §174.042, STATS. -- along with "humane officers" and "local health officers" -- to capture and restrain a dog which is running at large, complying with such obligation is certainly not an MPD Officer's primary function, nor one which an MPD Officer would even expect to perform with any frequency of any consequence.

16. I am unaware of any MPD issued Training Bulletins ever directing MPD Officers to take action to capture and restrain dogs that are running at large.

17. I am unaware of any MPD issued Training Bulletins ever directing MPD Officers on the manner in which to use the "noose" -- a device consisting of a pole with a "noose-like" rope attached to the pole's end, which has been purchased by the MPD for the purpose of capturing animals and which is supposed to be placed in MPD squad cars.

18. The Milwaukee Police Association shares Officer Cole's concern in the present litigation, namely; that the "Firefighter's Rule" not be expanded to encompass actions taken by City of Milwaukee Police Department Officers while acting in the course of their employment.

19. To that end, true and correct copies if the following documents are attached and marked accordingly:

Exhibit A	Wisconsin Administrative Code on The Law Enforcement Standards Board (WI ADC LES 3.01), setting forth the Law Enforcement Code of Ethics, which describes what the State of Wisconsin has determined to be the "fundamental duties" of a Police Officer (pertinent portions highlighted).
Exhibit B	Wisconsin Administrative Code on The Law Enforcement Standards Board (WI ADC LES 3.03), setting forth the Instructional Goals of law enforcement training.
Exhibit C	Wisconsin Administrative Code on The Law Enforcement Standards Board (WI ADC LES 3.06), setting forth Additional Training for law enforcement officers.

Dated this 19th day of March, 2002.

Bradley DeBraska
Bradley DeBraska

Subscribed and sworn to before me this
19th day of March, 2002.

Cindy M. Mahler
Notary Public, State of Wisconsin
My commission: 3-21-2004

Citation
WI ADC S LES 3.01
Wis. Adm. Code s LES 3.01
Wis. Admin. Code s LES 3.01

Search Result

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WISCONSIN ADMINISTRATIVE CODE
LAW ENFORCEMENT STANDARDS BOARD
CHAPTER LES 3. TRAINING STANDARDS
Current through Reg. No. 553 (January, 2002).

LES 3.01 Minimum standards for preparatory training.

(1) Minimum standards for preparatory training for law enforcement and tribal law enforcement officers shall require that:

(a) The minimum amount of preparatory training which must be successfully completed by a law enforcement or tribal law enforcement recruit before that recruit may be certified as eligible for permanent appointment shall be a total of 400 hours. The subjects and the minimum time during which they are to be covered in this preparatory training shall be determined by the board after due consideration of recommendations made by the advisory curriculum committee identified in s. LES 3.02. The curriculum so decided upon may be changed by the board as the need becomes apparent due to technological changes affecting law enforcement, current problems involving the public welfare or additional recommendations made by the advisory curriculum committee. Instructional goals for the 400 hour preparatory training course approved by the board are identified in s. LES 3.03.

(b) Trainees shall obtain passing grades of at least 70% or its lettered equivalent in written examinations in all subjects with the exception of competency-based subjects for which there are board approved examination checklists. For the competency-based subjects, trainees must demonstrate their achievement of training objectives to the satisfaction of board certified instructors.

(c) Each trainee must successfully complete this training within the original probationary period. Under justifiable circumstances, this period may be extended for a period not to exceed one year, but the total period during which a person may serve as a full-time law enforcement or tribal law enforcement officer on a probationary or temporary basis without successfully completing this training shall not exceed 2 years. Part-time officers must successfully complete the entire course in not more than 3 years. The total period during which a person may serve as a part-time law enforcement or tribal law enforcement officer on a probationary or temporary basis without successfully completing this training shall not exceed 3 years. For purposes of this section a part-time law enforcement or tribal law enforcement officer is a law enforcement or tribal law enforcement officer who routinely works not more than one-half of the normal annual work hours of a full-time employee of the employing agency or unit of government.

(d) The law enforcement code of ethics, as set forth below, shall be administered as an oath to all trainees during the preparatory course.

1. AS A LAW ENFORCEMENT OFFICER, my fundamental duty is to serve humanity; to safeguard lives and property; to protect the innocent against deception, the

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eak against oppression or intimidation, and the peaceful against violence or isorder; and to respect the Constitutional rights of all persons to liberty, equality and justice.

2. I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-estraint; and be constantly mindful of the welfare of others. Honest in though nd deed in both my personal and official life, I will be exemplary in obeying he laws of the land and the regulations of my department. Whatever I see or ear of a confidential nature or that is confided to me in my official capacity ill be kept ever secret unless revelation is necessary in the performance of m uty.

3. I WILL never act officiously or permit personal feelings, prejudices, nimosities or friendships to influence my decisions. With no compromise for rime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never mploying unnecessary force or violence and never accepting gratuities.

4. I RECOGNIZE the badge of my office as a symbol of public faith, and I ccept it as a public trust to be held so long as I am true to the ethics of th olice service. I will constantly strive to achieve these objectives and ideals edicating myself to my chosen profession...law enforcement.

(2) Minimum standards for jail and secure detention officer preparatory raining shall be as follows:

(a) A minimum of 120 hours of preparatory training shall be successfully ompleted by a jail or secure detention officer recruit before that recruit may e certified as eligible for permanent appointment. The subjects and minimum umber of hours for each subject to be covered in this preparatory training hall be determined by the board. The instructional goals may be changed by the oard as the need becomes apparent due to technological changes affecting jail r secure detention administration, current problems involving the public elfare or additional recommendations made by the advisory curriculum committee dentified in s. LES 3.02. Instructional goals for the 120 hour preparatory raining course approved by the board are identified in s. LES 3.04.

(b) Trainees shall obtain passing grades of at least 70% or its lettered quivalent in written examinations in all subjects with the exception of ompetency-based subjects for which there are board approved examination hecklists. For the competency-based subjects, trainees must demonstrate their chievement of training objectives to the satisfaction of board certified nstructors.

(c) Each recruit shall successfully complete this training within his or her riginal probationary period. Under justifiable circumstances this period may xtended for a period not to exceed one year.

(3) It should be noted that the foregoing represents the minimum amount of raining required. Additional preparatory training is strongly recommended whe ne employing authority is in a position to require it.

istory: Cr. Register, September, 1970, No. 177, eff. 10-1-70; am. (1) (a) egister, October, 1973, No. 214, eff. 11-1-73; am. (1) (c), Register, August, 976, No. 248, eff. 9-1-76; am. (1) (intro.), (a) and (c), renum. (2) to be (3

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WI ADC S LES 3.01

cr. (2), Register, October, 1984, No. 346, eff. 11-1-84; correction in (1) (c) made under s. 13.93 (2m) (b) 5., Stats., Register, October, 1984, No. 346; correction in (1) (d) made under s. 13.93 (2m) (b) 5., Stats., Register, August, 1993, No. 452; am. (1) (intro.), (a) and (c), (2) (intro.) and (a); r. and recr. (1) (b), Register, November, 1997, No. 503, eff. 12-1-97.

WI ADC s LES 3.01
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WI ADC S LES 3.03 | | | WI-ADC
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Wis. Admin. Code s LES 3.03

WISCONSIN ADMINISTRATIVE CODE
LAW ENFORCEMENT STANDARDS BOARD
CHAPTER LES 3. TRAINING STANDARDS
Current through Reg. No. 553 (January, 2002).

LES 3.03 Instructional goals.

The board shall approve student performance objectives to reach the following instructional goals for preparatory law enforcement and tribal law enforcement training:

(1) Demonstrate professional orientation.
(2) Demonstrate defensive tactics.
(3) Demonstrate care and use of firearms.
(4) Demonstrate community awareness.
(5) Perform emergency medical services.
(6) Demonstrate knowledge of legal procedures.
(7) Operate patrol vehicles.
(8) Enforce traffic laws and conduct accident investigations.
(9) Perform patrol operations.
(10) Conduct investigations.
(11) Reach performance objectives for elective subjects.
(12) Follow administrative procedures.

History: Cr. Register, February, 1981, No. 302, eff. 3-1-81; r. and recr., Register, November, 1997, No. 503, eff. 12-1-97.

WI ADC s LES 3.03
END OF DOCUMENT

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Citation
WI ADC S LES 3.06
Wis. Adm. Code s LES 3.06
Wis. Admin. Code s LES 3.06

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WI-ADC

WISCONSIN ADMINISTRATIVE CODE
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Current through Reg. No. 553 (January, 2002).

LES 3.06 Additional orientation.

Recommended additional recruit officer orientation by the employing agency should consist of each of the following subjects for a total of at least 120 hours:

(1) Departmental policies, rules and regulations and local ordinances.

(2) Firearms (familiarization with local weaponry and additional practice to improve proficiency with sidearm).

(3) Field training (with supervisor or coach).

History: Cr. Register, February, 1981, No. 302, eff. 3-1-81; renum. from LES 3.04, Register, October, 1984, No. 346, eff. 11-1-84; renum. from LES 3.05, Register, February, 1991, No. 422, eff. 3-1-91.

WI ADC s **LES 3.06**
END OF DOCUMENT

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STATE OF WISCONSIN
SUPREME COURT

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

vs. Case No. 02-1416

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR MILWAUKEE COUNTY, THE HONORABLE WILLIAM J. HAESE,
PRESIDING, CASE NO. 01-CV-007770,

ON CERTIFICATION FROM THE COURT OF APPEALS,
DISTRICT I, CASE NO. 02-1416

BRIEF OF DEFENDANTS-RESPONDENTS

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants-Respondents
Janet E. Cain
State Bar No. 01002721

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Milwaukee, WI 53202
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TABLE OF AUTHORITIES

Other Authorities:

STATEMENT OF ISSUES

The issue, as certified by the Wisconsin Court of Appeals, is as follows:

Does the Wisconsin's "firefighter's rule" first adopted in Hass v. Chicago & North Western Railway, 48 Wis. 2d 321, 179 N.W.2d 885 (1970), and later expanded by Pinter v. American Family Mutual Ins. Co., 2000 WI 75, 236 Wis. 2d 137, 613 N.W.2d 110, to include emergency medical technicians within the scope of the rule, bar a police officer from suing the owners of a stray dog for injury sustained by capturing the dog?

Answered by the trial court: Yes.

ARGUMENT

I. THE STANDARD OF REVIEW.

This is an appeal of a circuit court's grant of summary judgment to defendants-respondents, accepted on certification from the court of appeals. A grant of summary judgment is reviewed independently, using the same method as the circuit court. Sawyer v. Midelfort, 227 Wis. 2d 124, 595 N.W.2d 423 (1999). Summary judgment is to be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. at 136, 595 N.W. 2d 423 (quoting Schuster v. Altenberg, 144 Wis. 2d 223, 424 N.W.2d 159 (1988)).

As this court noted in Pinter v. American Family Mutual Ins. Co., 2000 WI 75, 236 Wis. 2d 137, 613 N.W.2d 110, cases decided on public policy grounds involve questions of law, to be determined solely by the court. Pinter at ¶13.

II. THE CIRCUIT COURT PROPERLY APPLIED THE FIREFIGHTER'S RULE TO POLICE OFFICERS.

The trial court granted summary judgment to respondents, applying the firefighter's rule to a police officer, despite the fact that the Supreme Court has not yet addressed the applicability of the rule to police officers. The trial court stated as follows:

> The court is aware that the firefighter's rule has yet to be expanded in Wisconsin to police officers. Such a case has

> apparently not arisen and has not yet been addressed by the Wisconsin Supreme Court. However, the court is hesitant to allow recovery under the facts of this case. Clearly police officers are injured by other's negligence in many if not all cases as that negligence necessitates their employment. Allowing police officers to sue for that very negligence is not in line with the public policy recognized by the firefighter's rule, which has been further extended to EMT's in Wisconsin. Accordingly and because the court has found that the "firefighter's rule" is applicable to the facts of this case, plaintiff is barred from recovery due to the dog owner's negligence.

(R19:5)

Review of the origin of the firefighter's rule and how it has been applied in subsequent cases makes it clear that the trial court appropriately determined that the firefighter's rule should include police officers injured by the negligence of a citizen necessitating police involvement.

A. Origin of the Firefighter's Rule.

The firefighter's rule was established in Hass v. Chicago & N.W. Ry. Co., 48 Wis. 2d 321, 179 N.W.2d 885 (1970), when the Supreme Court held that one who negligently starts a fire is not liable for negligence when it causes injury to a firefighter who comes to fight the fire. The plaintiff, Hass, was a volunteer firefighter who was injured while fighting a fire caused by the defendant. The Supreme Court initially noted that starting the fire was obviously negligence. Hass

at 326. Assuming that the negligence of the railroad was a substantial factor in causing injury to the firefighter, however, those factors do not necessarily lead to the determination that the defendant is liable. Hass at 326. The court noted that public policy considerations may preclude liability, quoting Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 as follows:

> It is recognized by this and other courts that even where the chain of causation is complete and direct, recovery against the negligent tortfeasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too "wholly out of proportion to the culpability of the negligent tortfeasor," or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way for fraudulent claims, or would "enter a field that has no sensible or just stopping point."

Colla at 598-599.

In considering the public policy factors, the Hass court determined that finding negligence on one who starts a fire, and requiring that individual to pay damages to a firefighter injured while fighting that fire places too great a burden on homeowners. Hass at 327. The court indicated that to impose liability on a homeowner would "enter a field that has no sensible or just stopping point." Hass at 327.

The Hass court limited its holding to cases alleging negligence in starting a fire when that negligence injures a firefighter who comes to fight the fire.

B. Interpretation of the Firefighter's Rule in Subsequent Cases.

There have been several cases wherein the Supreme Court of Wisconsin has further interpreted the firefighter's rule first set forth in Hass. Those cases are instructive in determining the extent to which the Supreme Court has been willing to broaden the firefighter's rule beyond Hass.

Seven years after Hass, the Supreme Court again considered the firefighter's rule in Clark v. Corby, 75 Wis. 2d 292, 249 N.W.2d 567 (1977). In that case, a fireman brought suit against homeowners and their minor son, alleging they were negligent in starting a fire, failing to warn of hidden hazards in the home, and violation of building code requirements regarding construction of a bedroom basement. The complaint alleged that the minor son of the defendants negligently started a fire when draining gasoline from a motorcycle into a basement sewer. When a fire broke out, the plaintiff firefighter responded. The plaintiff alleged that the defendants never warned of hidden dangers in the basement and that they were negligent in violating a building code which required an opening for escape in a basement bedroom.

The Supreme Court, noting that public policy considerations were the reason for denying recovery in Hass, determined that the plaintiff's first cause of action for negligence against the defendant homeowners and their son in starting the fire was properly dismissed for failure to state a cause of action. Clark at 296. Clearly, the facts with respect to negligence in starting the fire were akin to the facts of Hass and the Supreme Court followed its precedent in determining that the firefighter could not recover against one who negligently started a fire, for public policy reasons.

The plaintiff's second cause of action was for breach of a duty to warn the firefighter of special hazards in the basement known to them but unknown to the firefighter. This was an additional allegation of negligence against the homeowners -- separate and distinct from the allegation that they were negligent in starting the fire. The Supreme Court recognized that this was an issue that was not before it when Hass was decided. Clark at 296. The court determined that in Wisconsin, there is a duty on the part of a property owner to warn a firefighter of hidden hazards known to the owner but not known to the firefighter. Clark at 298. However, the court was careful to establish several prerequisites for such a claim to succeed. The court stated:

> . . . We make it clear that to trigger this duty to warn there must coexist the

> following four prongs: (1) A hidden hazard - a concealed danger that foreseeably created an unreasonable risk to others; (2) Which hidden hazard or danger is known to the landowner; (3) Which hidden hazard or danger is not known and not observable by the firefighter; and (4) Existence of a clear opportunity for the landowner to give warning of the hidden hazard.

Clark at 298. Under the facts of the Clark case, the Supreme Court sustained the trial court's overruling of the demurrer to this failure to warn cause of action.

Finally, the court addressed the plaintiff's third cause of action for failure to warn and breach of a duty by reason of alleged violation of a safety ordinance requiring escape openings in basements. Again this was an allegation of negligence separate from the negligence in starting the fire in the first place. The Supreme Court indicated that this claim would require that the ordinances which were allegedly violated were enacted to protect firefighters in the performance of their duties. Clark at 299. The court noted that in Wisconsin, protection of a safety statute or ordinance only extends to those whom the enactment was intended to protect. Clark at 299. The court found that whether the ordinance was intended to protect firefighters could more properly be decided at trial. Clark at 300.

Clark certainly did not broaden the firefighter's rule initially set forth in Hass. It applied the firefighter's

rule to preclude the claim against the homeowners for their initial negligence in starting the fire, but refused to expand the rule to include causes of action for any other negligent acts.

The Supreme Court next considered the firefighter's rule in Wright v. Coleman, 148 Wis. 2d 897, 437 N.W.2d 864 (1989). In that case, a firefighter injured his knee while attempting to fight a fire when he slipped on ice which was artificially created by the defendant's son while washing his car. The court was considering the question of whether an owner of land has a duty of ordinary care to a firefighter or whether the only liability an owner has to a firefighter is to warn of hidden hazards as stated in Clark v. Corby, supra. Wright at 899-900. The Supreme Court ultimately indicated that the appropriate standard to apply was ordinary and reasonable care. Wright at 900.

The Wright court made it clear that Clark, supra, did not stand for the proposition that a land owner only has a duty to warn of hidden hazards. The duty is broader than that. The court noted that Clark stood for the proposition that there is a duty to warn when the landowner knows of a hazard and fails to do so when a reasonable person would have done so in the same circumstances. Wright at 909. Like Clark, Wright was a case where there was an allegation of negligence over and

above the initial negligence of starting a fire.

The Supreme Court next interpreted the firefighter's rule in Hauboldt v. Union Carbide Corp., 160 Wis. 2d 662, 467 N.W.2d 508 (1991). In this case, an injured firefighter brought a product liability action against the manufacturer of an allegedly defective acetylene tank which exploded during a fire he had been called to. The manufacturer of the tank, Union Carbide, sought application of the firefighter's rule to absolve it of liability. The court noted at the outset of its decision that Union Carbide was not entitled to protection of the firefighter's rule. Hauboldt at 667. Public policy considerations were the rationale for establishing the firefighter's rule in respect to landowners whose negligence starts a fire, but no such policy reasons support application of the rule to manufacturers in product liability actions. Hauboldt at 667. The Hauboldt court specifically noted that none of the public policies set forth in Hass as justification for the firefighter's rule would be served by extending that rule to cover manufacturers in similar situations. Hauboldt at 675. Specifically, allowing recovery would not place too great a burden upon a manufacturer, because imposing liability on such manufacturers when a defective product injures a firefighter is no different from imposing liability for injuries caused by other defective products. Hauboldt at 675-

676. The court also noted that allowing recovery to the firefighter would not permit the law of negligence to enter a field that had no sensible or just stopping point. Hauboldt at 676. In fact, the court found that exactly the opposite was true -- holding the manufacturer liable "actually preserves the sensible and just stopping point we have established through our earlier cases." Hauboldt at 676. If in fact the court applied the firefighter's rule and protected the manufacturer from liability, the court noted that the door would be opened to expansive immunity from liability for manufacturers when their defective products injure firefighters, and this was not the intent of the firefighter's rule. Hauboldt at 676. The court noted that the purpose of strict product liability is to insure that the manufacturer bears the costs of injuries resulting from use of defective products, rather than the injured person. Hauboldt at 677. Thus, the court refused to expand the firefighter's rule to protect manufacturers sued for products liability by firefighters injured while fighting fires.

The history of the cases from Hass to Clark to Wright to Hauboldt, makes it clear that the firefighter's rule as established in 1970, at least up until 1991, remained a very limited exception to the general rule that one whose negligence causes injury is liable for damages. The rule was

not expanded by any of the cases up to that point. If anything, the firefighter's rule was limited to cases involving allegations of negligence in starting a fire. If there were any other separate allegations of negligence, the rule was held inapplicable to those causes of action.

In 2000, this court accepted certification of a case from the court of appeals in which an emergency medical technician attempted to sue a motorist involved in a car accident caused by negligence. In Pinter v. American Family Mutual Ins. Co., 2000 WI 75, 236 Wis. 2d 137, 613 N.W.2d 110, the Supreme Court expanded the firefighter's rule first established in Hass, and held that an EMT was barred from pursuing his cause of action against a negligent driver for injuries he sustained when providing medical assistance to the victim of the accident. Pinter at ¶51. The Pinter court went through the history of the firefighter's rule, and noted that the public policy limitation set forth in Hass is so limited that it applies in "few cases." Pinter at ¶31. The Pinter court noted that the rule only bars a claim when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency. Pinter at ¶31.

In Pinter, the plaintiff argued that Hass and the firefighter's rule should be limited to that case. However, the court refused to so limit the Hass finding, stating:

> . . . Hass is not an artificial, technical rule that applies only to firefighters. It is an application of the standard public policy analysis that applies to all tort cases in Wisconsin.

Pinter at ¶32. Thus, the court noted that the real issue they were deciding in Pinter was whether the public policy analysis set forth in Hass was still valid and whether it was logical to extend that analysis to the EMT's cause of action. Pinter at ¶33. The Pinter court first determined that the public policy analysis set forth in Hass was still valid. Pinter at ¶38. Having determined that, the court then went on to determine whether the public policy reasoning set forth in Hass extended to Pinter's cause of action as an EMT. Pinter claimed that there were two differences between his case and the Hass case. He first argued that EMT's are distinguishable from firefighters because EMT's are not specially trained to confront danger or throw themselves in harm's way. Pinter at ¶42. The court did not find this argument persuasive. The court noted that both professions require special training and experience that prepare them to provide assistance in dangerous emergency conditions, and that people entering both professions know that they will be expected to provide aid and protection to others in hazardous circumstances. Pinter at ¶43. Thus, the court concluded that EMT's were, like firefighters, specially employed and trained to confront

danger and therefore the distinction urged by Pinter was not sufficient to make his case any different from the firefighter's case in Hass.

Pinter also attempted to distinguish his case from Hass because in his case the negligence was based on negligent driving, not on negligent starting of a fire. Pinter at ¶45. Again, the court disagreed with Pinter, concluding that an auto accident is equivalent to a fire under the public policy analysis set forth in Hass. Pinter at ¶46. The court ultimately extended the Hass reasoning to the Pinter case, finding "no logical reason" to distinguish the public policy analysis set forth in Hass in determining the outcome of the case. Pinter at ¶47. The court found that permitting an EMT to recover under the circumstances presented in that case "would place an unreasonable burden on drivers who negligently caused collisions" and that the injury sustained by the plaintiff was "too remote from the initial acts of negligence that caused the collision." Pinter at ¶47. Furthermore, allowing the action to continue "would enter a field with no sensible or just stopping point." Pinter at ¶47. For these public policy reasons, the Supreme Court extended the firefighter's rule first set forth in Hass to cover an emergency medical technician when injured in the course of treating an automobile accident victim.

As the history of the cases interpreting the firefighter's rule shows, the rule is quite limited in its application. Since it was first set forth in 1970, it has been expanded on only one occasion, in a case involving an emergency medical technician. See Pinter, supra. The Supreme Court has repeatedly noted that public policy reasons are the basis for the rule. Thus, an analysis of whether the firefighter's rule applies in the present case to a police officer attempting to catch a dog must necessarily involve a determination as to whether the same public policy considerations apply.

III. EXPANSION OF THE FIREFIGHTER'S RULE TO POLICE OFFICERS IS A LOGICAL STEP IN THE DEVELOPMENT OF THE FIREFIGHTER'S RULE.

A. The Same Public Policy Considerations Set Forth in Hass and Reiterated in Subsequent Cases Require Application of the Firefighter's Rule to Police Officers in Similar Situations.

In Hass, the court noted that, "to make one who negligently starts a fire respond in damages to a firefighter who is injured is likely to place too great a burden on homeowners, and other occupiers of real estate." Hass at 327. The court also noted that "imposition of liability would permit the law of negligence to enter a field that has no sensible or just stopping point." Hass at 327.

The Pinter court went further in explaining why the firefighter's rule is consistent with public policy:

> Fundamentally, the rule recognized in Hass is an expression of public policy because it prohibits a firefighter from "complaining about the negligence that creates the very need for his or her employment." Hauboldt, 160 Wis.2d at 676, 467 N.W.2d 508 (quoting Mignone v. Fieldcrest Mills, 556 A.2d 35, 39 (R.I. 1989)). As stated by the Supreme Court of Hawaii:
>
> > The very purpose of the firefighting profession is to confront danger. Firefighters are hired, trained, and compensated to deal with dangerous situations that are often caused by negligent conduct or acts. "It offends public policy to state that a citizen invites private liability merely because he happens to create a need for those public services."
>
> Thomas, 811 P.2d at 825. Permitting firefighters to pursue actions like the one in Hass is therefore not consistent with the relationship of the firefighting profession to the public. See id. It would contravene public policy to permit a firefighter to recover damages from an individual who has already been taxed to provide compensation to injured firefighters. Hauboldt, 160 Wis.2d at 677, 467 N.W.2d 508 (citing Mignone, 556 A.2d at 39).

Pinter at ¶39.

Negligently starting a fire is much like negligently allowing one's dog to run loose or negligently getting into a car accident. In all situations, professional help is needed, whether it be in the form of a firefighter, police officer or emergency medical technician. Individuals in need of this

type of assistance should not be concerned about their negligence harming the professional who responds to their need.

Police officers are hired, trained and compensated to deal with dangerous situations such as capturing a stray dog, caused by negligent conduct of citizens. Permitting a police officer to pursue an action against a negligent dog owner for allowing a dog to run at large is not consistent with the relationship of police officers to the public. In this case, respondent's alleged negligence caused a need for the police intervention. To now hold respondents liable for the police officer's injuries contravenes public policy.

The public policy reasons set forth in Hass and Pinter are still valid today, and apply equally to police officers as they did to firefighters and EMT's.

B. A Police Officer Fulfills a Similar Role to a Firefighter and Emergency Medical Technician, Requiring Expansion of the Firefighter's Rule to Police Officers.

Appellant attempts to distinguish a police officer from a firefighter or EMT, arguing that it is not a police officer's primary function to rescue people in danger. In Pinter, however, the court did not focus entirely on the fact that firefighters or EMTs are "rescuers." Indeed, the court stated that both firefighters and EMT's know they are expected to provide aid and protection in hazardous circumstances.

Pinter at ¶43. The court noted that EMT's are in a position where they are "specially employed and trained to confront danger." Pinter at ¶44. Certainly, police officers, like EMT's and firefighters, are trained to confront danger, and have a duty to "aid and protect" citizens.

The affidavit of Bradley Debraska attaches a portion of the Wisconsin Administrative Code setting forth training standards for law enforcement personnel. That training standard contains the law enforcement code of ethics, which reads, in pertinent part, as follows:

> As a law enforcement officer, my fundamental duty is to serve humanity; safeguard lives and property; . . .

(R:17-4)

Furthermore, the training standards regarding instructional goals for law enforcement training indicate that one of those goals is to "perform emergency medical services." (R:17-7) Given that police officers have a duty to safeguard lives and property and to perform emergency medical services, they are clearly in a similar position to a firefighter or an EMT when performing their job duties. They not only confront danger, but they safeguard lives and provide emergency services. Thus, it can be argued that a police officer is required to perform a combination of the duties of a firefighter and an EMT. Certainly, if the firefighter's rule applies to an emergency medical technician, it also would

apply to a police officer in the course of his duties.

The affidavit of Bradley Debraska also acknowledges that police officers have a duty under Wis. Stats. §174.042, to capture and restrain a dog which is running at large. (R17:2) Obviously, one purpose of an officer attempting to capture a dog running at large is to protect the public from hazardous or dangerous situations that the dog may present. Furthermore, although appellant claims that the Milwaukee Police Department doesn't provide any training on how to capture or handle stray dogs, she does acknowledge that some squad cars are equipped with a "noose" to be used to capture stray animals. (R:16-4,6) Why would equipment be generally available to police if they were not expected to capture stray animals? Although appellant claims to have had no professional training in capturing stray dogs, she voluntarily chose to attempt to capture the dog she encountered on the date of the incident, because it was her job to "put herself in harm's way for the protection of others." Presumably, she did this because she was specially employed and trained to confront danger, and she was doing her job as a police officer. In this respect, this case is no different from the Hass or Pinter cases, wherein the firefighter and EMT, respectively, were putting themselves in harm's way for the protection of others -- in other words, they were doing their jobs just as appellant was in this case. Appellant was

injured while she was confronting danger to protect others.

Appellant's attempts to distinguish this case from Hass and Pinter because she was not a "rescuer" should be rejected. Hass and Pinter were not decided on the basis of whether the firefighter or EMT were rescuing someone when they were injured. Those cases were based on the fact that these professionals, whose job it was to "put themselves in harm's way for the protection of others" were injured while responding to a situation they were called to in performance of their professional duties. Simply because appellant in this case was not rescuing a human being does not bring this case out of the realm of Hass and Pinter.

Appellant argues that police officers should not be encompassed within the firefighter's rule, likening this case to Mullen v. Cedar River Lumber Co., 2001 WI App. 142, 246 Wis. 2d 524, 630 N.W.2d 574. In that case, a superintendent of public works was injured when responding to an oil spill, and the Court of Appeals refused to apply the firefighter's rule to bar the action. The court based its decision on the fact that the superintendent of public works job was not similar to the role of a firefighter or EMT. Mullen at ¶16. The court noted that, "unlike firefighters and EMTs, Mullen is not a professional rescuer who is 'specially trained and employed to conduct rescue operations in dangerous emergencies.'" Mullen at ¶16 quoting Pinter, 2000 WI 75 at

¶43, 236 Wis.2d 137, 613 N.W.2d 110. Clearly, the job of a police officer is more akin to the job of a firefighter or an EMT than a superintendent of public works. There is clearly an element of danger and a requirement of special training for a police officer to handle situations which would put the police officer in harm's way. The same cannot be said for a superintendent of public works. Even if a police officer cannot be termed a "professional rescuer," as appellant seems to be arguing, a police officer is clearly in a job where he or she faces emergency situations or confronts danger on a regular basis.

Numerous other jurisdictions have applied the firefighter's rule to police officers. In fact, the Supreme Court of Alaska recently adopted the firefighter's rule in Moody v. Delta Western Inc., 38 P.2d 1139 (Alaska 2002), applying it to a police officer. The court cited public policy reasons for joining "the overwhelming majority of states that have adopted the rule." Moody at 1139-1140.

Given the number of states which have applied the firefighter's rule to police officers, calling the rule the "firefighter's rule" is somewhat of a misnomer. In fact, many cases, when setting forth the rule, refer specifically to firefighters and police officers in their statement of the rule. For example, in Moody, supra, the court noted that, "the firefighter's rule holds that firefighters and police

officers who are injured may not recover based on the negligent conduct that required their presence." Moody at 1140.

In Neighbarger v. Irwin Industries, Inc., 8 Cal. 4th 532, 822 P.2d 347 (1994) the Supreme Court of California set forth the rule as follows:

> . . . a special rule has emerged limiting the duty of care the public owes to firefighters and police officers. Under the firefighter's rule, a member of the public who negligently starts a fire owes no duty of care to assure that the firefighter who is summoned to combat the fire is not injured thereby. (Walters v. Sloan (1977) 20 Cal. 3rd 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609 (Walters); see also 6 Witkin, Summary of Cal. Law, supra, Torts, Sec. 739, p. 69; Levy, et al., California Torts (1993) Sec. 1.03 [4][b], p. 1-29.) Nor does a member of the public whose conduct precipitates the intervention of a police officer owe a duty of care to the officer with respect to the original negligence that caused the officer's intervention. (Walters, supra, 20 Cal. 3rd 199, 142 Cal. Rptr. 152, 571 P.2d 609; Hubbard v. Boelt (1980) 28 Cal. 3rd 480, 169 Cal. Rptr. 706, 620 P.2d 156.) (Emphasis added)

Neighbarger at 538.

In Hubbard v. Boelt, supra, the court set forth its statement of the firefighter's rule, and added, "the rule, which has been held equally applicable to policemen injured in the course of their duties, is based on the principle that it is the business of a fireman or policeman to deal with particular hazards, and that accordingly 'he cannot complain

of negligence in the creation of the very occasion for his engagement.'" Hubbard at 484.

In Stott v. Wayne Co., 224 Mich. App. 422, 569 N.W.2d 633 (1997), the Michigan Court of Appeals stated that the firefighter's rule "prevents police officers and firefighters from recovering for injuries sustained in the course of duty." Stott at 426, quoting Woods v. City of Warren, 439 Mich. 186, 482 N.W.2d 696 (1992).

In Madonna v. American Airlines, Inc., 82 F.3d 59 (2d Cir. 1996), the U.S. Court of Appeals, discussing a New York case, noted that, "New York employs the 'firefighter's rule,' a common law doctrine that bars firefighters and police officers from recovering for injuries caused by 'negligence in the very situations that create the occasion for their services.'" Madonna at ¶9.

In Fox v. Hawkins, 594 N.E.2d 493 (Ind. App. 1992), the Court of Appeals of Indiana applied the rule to "public safety professionals":

> The fireman's rule is a venerable doctrine of tort law that holds public safety professionals, whose occupations by nature expose them to particular risks, may not hold another negligent for creating the situation to which they respond in their official capacity.

Fox at 495,quoting Koehn v. Devereaux, 495 N.E.2d 211 (Ind. App. 1986).

The Georgia Court of Appeals has also expanded the

firefighter's rule to apply to a police officer. In Martin v. Gaither, 219 Ga. App. 646, 466 S.E.2d 621 (1995), the plaintiff police officer was injured when he stepped into the street to talk to a motorist who was disobeying a traffic sign. He was struck by a bus as he was instructing the illegally parked motorist. The police officer brought an action against the motorist as well as the bus company. In holding that the firefighter's rule applied to the cause of action against the motorist, the court made mention of the fact that the police officer's occupation "as a traffic cop intrinsically or inherently requires risk-taking in or about traffic." Martin at 650. Ultimately, the court expanded the firefighter's rule to this police officer, noting that a tort claim could not be based upon damage caused by the very risk the officer is paid to encounter and for which he is trained. Martin at 651. The court quotes a New Jersey decision, Krauth v. Geller, 157 A.2d 129, 31 N.J. 270 (1960) for the proposition that the motorist who was illegally parked did not owe the police officer a duty to exercise care "so as not to require the services for which he is trained and paid." Martin at 651 quoting Krauth at 131.

Finally, in Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984), the Supreme Court of Iowa was deciding whether to join the "general trend" and adopt the fireman's rule in that state. That court noted that the firefighter's rule is one

"which limits liability for certain negligent acts or wrongful conduct causing on the job injuries to firefighters or policemen." Pottebaum at 643.

These cases illustrate that many jurisdictions make no distinction between firefighters and police officers in determining whether the firefighter's rule is applicable in a given case. Thus, the name "firefighter's rule" is not an accurate description of the rule. Furthermore, even states where the rule was initially applied to a firefighter have held, in subsequent cases, that police officers are subject to the same rule for public policy reasons.

These jurisdictions recognize that it is not the act of rescuing which bars a firefighter or police officer from making a claim, rather it is the fact that they are responding to a danger or knowingly confronting a hazard that bars their claim. Firefighters and police officers have similar roles within the community, to protect the public from dangerous situations. Whether fighting a fire or capturing a stray dog, firefighters or policemen are both knowingly confronting danger. This is their job, and they should not be allowed to maintain claims against individuals whose alleged negligence necessitates their services.

C. The Firefighter's Rule is Not Based on Assumption of Risk.

Appellant takes the position that application of the

firefighter's rule to police officers would be at odds with prior decisions of this court which abrogated the doctrine of implied assumption of risk. (Appellant's brief at p. 23) She argues that assumption of risk has, in many jurisdictions, served as the basis for application of the firefighter's rule to firefighters. (Appellant's brief at p. 26) She contends that, therefore, since Wisconsin has abrogated the doctrine of implied assumption of risk, this court should abolish the firefighter's rule all together, or in the alternative, maintain the firefighter's rule but refuse to expand its application to police officers. (Appellant's brief at p. 27) This argument must fail.

In Hass, supra, wherein the Supreme Court of Wisconsin first established the firefighter's rule, the court made it clear that its decision was based on public policy, not on the assumption of risk doctrine. The court stated that, "the determination to not impose liability in instances where a negligent act has been committed and the act is a 'substantial factor' in causing the injury rests upon considerations of public policy." Hass at 326. The Hass court noted that the question it was answering was whether it contravened public policy to permit a firefighter to recover against a tortfeasor whose only negligence was in starting a fire and failing to curtail its spread. Hass at 327. Ultimately, the court determined, for public policy reasons, that one who

negligently starts a fire is not liable for injury to a firefighter in fighting that fire. The court did not base its decision on the doctrine of assumption of risk at all.

In 1989, the Supreme Court, in Wright, supra, made specific reference to the doctrine of assumption of risk, and noted that the firefighter's rule in Wisconsin, as established in Hass, was based on public policy grounds, not the assumption of risk doctrine. Wright at 904. The Wright court made specific mention that while other jurisdictions have based the firefighter's rule on the assumption of risk doctrine, in Wisconsin, that doctrine is no longer recognized as a bar to liability. Wright at 904.

In Pinter, supra, the court removed any doubt about the basis for the firefighter's rule, when it stated:

> . . . However, Hass was never premised on the idea that a firefighter's assumption of the risks inherent in his or her profession makes the firefighter's negligence greater than the alleged tortfeasor's as a matter of law. Instead, Hass was based squarely on Wisconsin's traditional public policy analysis in negligence cases.

Pinter at ¶36.

Clearly, Wisconsin's version of the firefighter's rule was never based on the doctrine of assumption of risk, and therefore, abrogation of that doctrine should have no effect on applicability of the firefighter's rule. Because the firefighter's rule was based on public policy considerations,

it can peacefully coexist with cases which have abrogated the doctrine of assumption of risk in Wisconsin.

D. Contrary to Appellant's Assertion, Cases From Other Jurisdictions Are Not Based On The Doctrine Of Assumption Of Risk, But Rather On Public Policy Grounds, Similar To The Grounds Relied On By Wisconsin Courts.

Appellant argues that foreign cases cited by respondent in support of the argument that the firefighter's rule should apply to police officers are inapplicable to this case, because those jurisdictions base the firefighter's rule on the doctrine of assumption of risk. A review of those cases, however, makes it clear that many, if not most, other jurisdictions have adopted the firefighter's rule on public policy grounds, not assumption of risk.

In Neighbarger, supra, the Supreme Court of California noted that in that state, the doctrine of assumption of risk bars a claim only when it is shown that, because of the nature of the activity and the party's relationship to that activity, the defendant owed no duty of care to the plaintiff. Neighbarger at 538. The court indicated that the firefighter's rule was "a special rule" limiting the duty of care that the public owes to firefighters and police officers. Neighbarger at 538. In making that determination, the court examined the public policy involved in establishing that there was no duty of care on the part of an individual who starts a fire or creates a need for police intervention. Neighbarger

at 539. The court specifically referred to public policy and pointed out several public policies which were furthered by the firefighter's rule. First, the court noted that "as a matter of fairness, police officers and firefighters may not complain of the very negligence that makes their employment necessary." Neighbarger at 539-540. Secondly, the court indicated that public safety employees are paid for confronting the dangers that citizen's negligence creates. Neighbarger at 540. Lastly, the court noted that abolition of the firefighter's rule would result in "relatively pointless litigation" between employers, the retirement system and a defendant's insurance company regarding indemnification. Neighbarger at 353. Neighbarger indicated that the court has confirmed the policy basis for the firefighter's rule in other cases, Hubbard, supra, being one of those. Ultimately, in explaining the firefighter's rule and the basis for its rule, the court made clear that in California, the rule was not based on assumption of risk. The court stated:

> As we have explained, the proper basis for the firefighter's rule after Knight, supra, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696, is a legal conclusion that the person who starts a fire owes no duty of care to the firefighter who is called to respond to the fire. (Id. at pp. 309-310, F.N. 5, 11 Cal. Rptr. 2d 2, 834 P.2d 696; see also Donohue v. San Francisco Housing Authority (1993) 16 Cal. App. 4th 658, 663, 20 Cal. Rptr. 2d 148.) After Knight, supra, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696, the rule cannot

> properly be said to rest on the plaintiff firefighter's voluntary acceptance of a known risk of injury in the course of employment, and we disregard that element of the justification for the rule offered in Walters, supra, 20 Cal. 3d 199, 142 Cal. Rptr. 152, 571 P.2d 609, and other cases. Rather, in order to determine whether the defendants owe a duty to a private firefighter, or to a private safety employee, we examine whether the policy reasons offered for the rule in the context of the public employee apply in the private sector. We also keep in mind, as we directed in Knight, supra, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696, the nature of the defendant's activities and the relationship of the plaintiffs and the defendants to that activity to decide whether, as a matter of public policy, the defendants should owe the plaintiffs a duty of care.

Neighbarger at 541.

Thus, in California the firefighter's rule, which has been expanded to police officers, is based on public policy grounds, not on the doctrine of assumption of risk. The same can be said for Alaska (Moody, supra) and Michigan (Stott, supra). The fact of the matter is that the firefighter's rule has been grounded on the doctrine of assumption of risk by some courts and on public policy grounds by others. This was recognized by the Supreme Court of Iowa in Pottebaum, supra, when it stated:

> Other courts rely on the assumption of risk doctrine to bar recovery for damages caused to policemen or firefighters from those risks that are inherent in their jobs. . . .

> Still others rely on public policy considerations in limiting recovery for injuries incurred by public safety officers while performing in an official capacity. (citations omitted) Regardless of the rationale invoked to support the rule, courts almost universally recognize that neither a fireman nor a policeman can recover when their complaint is based on the same conduct that initially created the need for the officer's presence in his official capacity. (citations omitted)

Pottebaum at 645.

Wisconsin's firefighter's rule was based on public policy grounds, not on assumption of risk. While some jurisdictions have based adoption of the firefighter's rule on assumption of risk and others on public policy grounds, it's clear that regardless of the grounds, the rule is sound and, as stated by the Pottebaum court, "it is undeniably true, . . . that almost all jurisdictions confronting this issue have adopted some form of the fireman's rule." Pottebaum at 644.

IV. EXPANSION OF THE FIREFIGHTER'S RULE TO POLICE OFFICERS DOES NOT VIOLATE THE INTENDED PURPOSE OF THE RULE NOR WILL IT LEAD TO A FLOOD OF LITIGATION.

Appellant argues that adopting the firefighter's rule in this case would result in a flood of litigation and violate the intended purpose of the rule. Appellant sets forth numerous scenarios which she claims would be disallowed by courts if the firefighter's rule were expanded to include actions by police officers. She cites to cases involving both

public sector employees and private sector employees and notes that the rule could be used as an affirmative defense to bar such causes of action in "all sorts of heretofore unimaginable cases." (Appellant's brief at p. 32)

First, as indicated, supra, the firefighter's rule has been limited thus far to cases involving firefighters and emergency medical technicians. Litigants have attempted to expand that rule to include injuries to a superintendent of public works and injuries caused by an allegedly defective product, but Wisconsin courts have rejected such attempts. See Mullen and Hauboldt, supra. There is no reason to believe that defendants would attempt to invoke the firefighter's rule to bar plaintiffs' cases every time a person in a position of authority is injured due to negligence. Since the firefighter's rule is based firmly on public policy, a defendant would have to show that that public policy would be furthered by barring a cause of action, and it is doubtful that any court would lightly dismiss a plaintiff's cause of action if the public policy consideration set forth in Hass and its progeny were not met. It makes sense in this case, given the similarity of the profession of police officer to the profession of firefighter to expand the rule. Expansion of the firefighter's rule to include police officers would not establish a blanket exception to the general rule of liability for any individuals who may be faced with a dangerous

situation while in the course of their employment. Certainly, private sector employees have not yet been included in the firefighter's rule and there is no reason to believe that expansion of the rule to include police officers would lead to the conclusion that private sector employees' causes of action could be barred pursuant to the rule.

It is important to note that expansion of the firefighter's rule to police officers would actually be more likely to discourage litigation than to encourage litigation or lead to a flood of litigation. The threat that the firefighter's rule may be a bar to a cause of action would not likely dissuade a plaintiff from bringing a cause of action unless he or she was a firefighter, EMT or police officer. Adoption of the rule to police officers would, however, likely dissuade a police officer from bringing a cause of action based solely on the negligence which necessitated his or her services, knowing that the action is barred by the firefighter's rule. It is illogical to assert that adopting the firefighter's rule to police officers would lead to more litigation. In fact, the opposite is true.

V. ALL OF APPELLANT'S CLAIMS ARE BARRED AS THE CLAIMS ARE BASED SOLELY ON RESPONDENT'S INITIAL ACTS OF ALLEGED NEGLIGENCE.

Appellant argues that because she has alleged negligence under several theories, some of which are not based solely on the initial act of negligence by respondents, some of her

claims should survive. The trial court, however, disagreed, based on Wisconsin precedent and dismissed plaintiff's case in its entirety.

A. Appellant's Cause of Action Based on Violation of a Milwaukee Ordinance Was Properly Dismissed.

Appellant claims that respondents violated Chapter 78 of the Milwaukee Code of Ordinances in harboring a dangerous animal and in failing to muzzle the animal. Appellant indicates that her causes of action based on violation of these ordinances survive as long as she can demonstrate that she, as a police officer, was within the scope of those whom the ordinances were meant to protect. As explained by the trial court, any alleged violation of ordinance is not a violation of a statute specifically enacted to protect police officers from injury. (R19:3) The court noted that a statute such as this is enacted to protect the public in general and punish dog owners, however as a police officer, appellant undertakes such jobs as encountering stray animals that are potentially dangerous. (R19:3) The trial court pointed out that in Pinter, a similar argument was made, but rejected by the Supreme Court. (R19:3) In that case, Pinter suggested that the negligent drivers who caused the accident violated a motor vehicle code, and that provided a separate basis for recovery. In rejecting this argument, the Pinter court stated:

> However, "the protection of a safety statute or ordinance is extended only to those whom the enactment was intended to protect." Clark, 75 Wis.2d at 299, 249 N.W.2d 567. Unlike the Municipal Housing Codes at issue in Clark, motor vehicle code provisions are not arguably designed to protect rescuers in the performance of their duties. See Clark 75 Wis.2d at 300, 249 N.W.2d 567. We conclude that an automobile collision is equivalent to a fire under the public policy analysis in Hass.

Pinter at ¶46.

Similarly, the trial court in the present case stated that the ordinances which appellant claims were violated in this case are enacted to protect the public in general and punish dog owners, not police officers in the performance of their duties. (R19:3)

Appellant claims that the trial court "misconstrued" Clark v. Corby, 75 Wis.2d 292, 249 N.W.2d 567 (1977). However, this becomes moot in light of the Supreme Court's statements in the Pinter case, quoted above. Whereas the Clark court may not have gone as far as saying that the a plaintiff has to prove that an ordinance was "specifically enacted" to protect a firefighter, the Pinter court clearly takes that extra step, and indicates that motor vehicle code provisions are not arguably designed to protect rescuers in the performance of their duties. The ordinance for keeping animals, which is at issue in this case, is akin to the motor

vehicle ordinances, in that it was clearly meant to protect the public at large. Ordinance 78-3 reads as follows:

> 78-3. Owner or caretaker's duty; presumption. 1. The owner or caretaker of any animal shall confine, restrain or maintain control over the animal so that the unprovoked animal does not attack or injure any person or domesticated animal.

(R16:20)

Nowhere in Chapter 78 of the Milwaukee Ordinances is there any reference to protection of police officers. The simple fact that appellant herein was a member of the public as well as being a police officer does not bring her within the realm of protection of the statute when she was engaging in her occupation of police officer. Appellant's claim that the ordinance was meant to protect her because she "remains a member of the public, regardless of the facts (sic) that she was wearing her uniform at the time of her injury," is contrary to the Pinter court's decision in this regard.

B. Appellant's Causes of Action Based Upon Failure to Warn Were Properly Dismissed.

Appellant argues that her causes of action based on defendant's failure to warn should survive even if this court finds that the firefighter's rule applies. However, appellant fails to explain how the respondents could possibly have warned her of any dangerous propensities of their dog, when there is no evidence that they knew their dog was loose or that appellant was trying to catch it. Appellant claims that

respondents "had the opportunity to warn and could have warned by simple compliance with the ordinance requiring use of a muzzle." (Appellant's brief at p.30) First, if they are alleging failure to muzzle the dog, that is an allegation of violation of the Milwaukee ordinance, which, as indicated in the previous section, was not meant to apply to protect police officers. Secondly, it makes no sense to argue that respondents had a duty to warn appellant of anything, when they had absolutely no contact with her whereby they had the opportunity to warn. In Clark, supra, the Supreme Court of Wisconsin made it clear that to trigger a duty to warn the danger must be unobserved and there must be a clear opportunity to give warning. Clark at 298. Here, the danger (a strange dog)was observable and there was no opportunity to warn, as respondents were unaware of appellant's actions.

Furthermore, the Hass court noted:

> It is therefore obvious that the duty of a landowner to a firefighter in respect to warning of the hazard is satisfied by the very nature of the call for assistance. The hazard of fire feared by the landowner and for which he asks aid in fighting is the very reason for the summons to duty. The call to duty is the warning of the hazard; and even in the absence of a summons by the occupier of the land, the hazards of fire are apparent. . . .

Hass at 324-325. Similarly, in the present case, even though the appellant was not called to capture the dog, the hazards

of a large dog, unfamiliar to the appellant, were apparent. In light of the fact that the respondents had no opportunity to warn, and that the danger in confronting a strange dog was obvious, the cause of action based on failure to warn was properly dismissed.

CONCLUSION

Wisconsin has heretofore applied the firefighter's rule only to firefighters and EMT's. The rule is based on public policy considerations. Applying those same public policy considerations to police officers, it is only logical and consistent to apply the firefighter's rule to police officers as well. Whether it be a firefighter, an emergency medical technician or a police officer, public policy dictates that these professionals should not be allowed to maintain a cause of action against an allegedly negligent citizen who created the very situation they were responding to. While Wisconsin has not yet addressed the issue of the applicability of the firefighter's rule to policy officers, jurisdictions other than Wisconsin that have addressed the issue have held that the rule applies equally to police officers. Public policy dictates that Wisconsin expand the firefighter's rule to include police officers along with firefighters and EMT's. In addition, the other causes of action set forth in appellant's complaint must also fail, as they are based on either ordinances which were not meant to protect appellant as a

police officer, or based on a failure of the respondents to warn appellant of the dangerous propensities of their dog, which was impossible given that they had no contact with her prior to injury.

For the reasons set forth above, and based on the Wisconsin precedent as well as the numerous cases from other jurisdictions which have held the firefighter's rule applicable to police officers, respondents respectfully request this court affirm the decision and order of the trial court granting summary judgment to respondents and dismissing appellant's complaint.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), STATS., as modified by the court's order for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 37 pages.

Dated: June 9, 2003

PETERSON, JOHNSON & MURRAY, S.C.

By: Janet E. Cain
Janet E. Cain

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STATE OF WISCONSIN
SUPREME COURT

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

PLAINTIFF-APPELLANT'S REPLY BRIEF

CERTIFICATION ACCEPTED FROM
COURT OF APPEALS, DISTRICT ONE, CASE NO. 02-1416

APPEAL FROM AN ORDER OF
THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE WILLIAM J. HAESE, PRESIDING
MILWAUKEE CIRCUIT COURT CASE NO. 01-CV-007770

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I. PUBLIC POLICY UNDERLYING WISCONSIN'S FIREFIGHTER'S RULE DOES NOT WARRANT EXTENSION OF THE RULE TO POLICE OFFICERS.

In ***Hass v. Chicago and Northwestern Railway,*** *48 Wis. 2d 321, 179 N.W.2d 885 (1970),* this Court utilized two of the judicial public policy factors of ***Colla v. Mandella,*** *1 Wis. 2d 594, 85 N.W.2d 345 (1957),* to hold that, one who either negligently starts a fire, or fails to curtail its spread, cannot be liable when such acts/omissions cause injury to a firefighter responding to extinguish the blaze. This court reasoned that permitting liability would: 1) place too great a burden on owners/occupiers of real estate, and; 2) enter a field that has no sensible or just stopping point. ***Id.*** *at 327.*

In ***Pinter v. American Family Insurance Co.,*** *2000 WI 75, 236 Wis. 2d 137, 613 N.W.2d 110,* this Court used that same policy analysis to apply the Firefighter's Rule to EMTs, reasoning that to allow EMTs to recover against a driver whose negligence was the *sole cause* of the emergency response, would place an unreasonable burden on drivers who negligently cause collisions. ***Id.*** *at ¶47.*

In order to determine whether Wisconsin's Firefighter's Rule should apply to police, it is therefore necessary to clarify the rationale underlying the public policy pronouncement in ***Hass.*** In other words, *why would it "place*

too great of a burden" on homeowners and negligent drivers to respond in tort to a firefighter injured while fighting the fire or an EMT injured while rendering assistance to an injured negligent motorist?

A. This Court has consistently declared the Rule to be based on public policy - most reasonably premised on the public policy of promoting rapid rescue response - and not on assumption of risk.

This Court has consistently declared that the Firefighter's Rule is premised on "public policy,"[1] and that, unlike other jurisdictions, Wisconsin's version of the Firefighter's Rule is not based on assumption of risk principles. ***Wright**, 148 Wis. 2d 897 at 904; **Pinter**, 2000 WI 75 at ¶36.* The public policy underlying Wisconsin's Firefighter's Rule was, most reasonably, based upon encouraging the greater social goal of rapid rescue response, so as to permit individuals requiring emergency assistance as a result of negligently starting or failing to curtail a fire to summon aid without hesitating to consider whether they might be liable for their negligent act(s). This public policy quite clearly translates to EMTs who, like firefighters, are professional rescuers. Importantly, the

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[1]***Hass**, 48 Wis. 2d 321 at 327; **Clark v. Corby**, 75 Wis. 2d 292, 295, 249 N.W.2d 567 (1977); **Wright v. Coleman**, 148 Wis. 2d 897, 907, 436 N.W.2d 864 (1989); **Hauboldt v. Union Carbide Corp.**, 160 Wis. 2d 662, 675, 476 N.W.2d 508 (1991),* and ***Pinter**, 2000 WI 75 at ¶¶38, 39, 47.*

status of EMTs as professional rescuers was crucial to ***Pinter's*** decision to extend the Rule to EMTs.

As recognized in ***Hass***, and confirmed in ***Pinter***, the Firefighter's Rule:

> "... bars a cause of action **only** when the sole negligent act is the same negligent act that **necessitated rescue** and therefore brought the firefighter to the scene of the **emergency**." ***Pinter***, *2000 WI 75 at ¶31 (emphasis added).*

In an attempt to liken police officers to firefighters and EMTs, Defendants-Respondents present an oversimplified and incomplete characterization of the holding in ***Pinter***. A complete presentation of ***Pinter***, however, demonstrates that the Court expanded application of the Rule, not simply because EMTs were trained to confront danger, but specifically because both firefighters and EMTs are "professional rescuers who are specially trained and employed to conduct rescue operations in dangerous emergencies." ***Id.*** *at ¶43.*

As it is only firefighters and EMTs who are specifically trained and employed to conduct rescue operations in dangerous emergencies, the public policy of rapid **rescue** response does not translate to police officers. As such, *only* firefighters and EMTs should remain subject to the limitations of the Rule.

B. The nature, scope and function of a police officer is so dramatically different from that of either a firefighter or EMT, that application of the Rule in this case defies logic.

While Wisconsin has consistently found it reasonable to prevent firefighters from bringing negligence actions for injuries suffered as a result of *routine and readily predictable fires with foreseeable hazards*, ***see Clark***, *75 Wis. 2d 292*; ***Wright***, *148 Wis. 2d 897*, this Court has refused to apply the Rule to bar firefighters from recovering for injuries sustained as a result of "extraordinary" circumstances. ***See Hauboldt***, *160 Wis. 2d 662*.

It is this reluctance to provide immunity in the face of known, hidden or reasonably foreseeable dangers which provides the very reason not to apply the Rule to police. Unlike firefighters, police suffer injury resulting from unpredictable or undeterrable behavior; inherent in being "a cop," is the probability of injury from a third party whose actions are dangerous, negligent, or wilful and wonton.

As initially envisioned in ***Hass***, Wisconsin's Firefighter's Rule bars a firefighter's negligence action against the *original source* of the negligence requiring the emergency/rescue response (e.g., the homeowner who negligently starts a fire, or fails to curtail its spread). However, with police it's often extremely difficult to determine the specific act of negligence requiring the officer's presence.

As recognized more than twenty-five years ago:

> The police function is incredibly complex. The total range of police responsibilities is extraordinarily broad. Many tasks are so entangled that separation appears impossible. And the numerous conflicts among different aspects of the function cannot be easily reconciled. *David L. Strauss,* ***Where There's Smoke, There's the Firefighter's Rule; Containing The Conflagration after One Hundred Years,*** *1992 Wis. L. Rev. 2031, 2045 n.66 (citation omitted).*

Furthermore, as recognized by a secondary source cited in ***Pinter***:

> **As compared to the more predictable public needs for firefighters, police calls are frequently more complex and evolving - often making it difficult to determine whether an officer's injury relates to the original basis for the call** . . . by the time an officer arrives at a scene, the original basis for the call may have developed into a completely unanticipated dilemma . . . the actual reason for the call may be misinterpreted by a dispatcher or mistransmitted to police units in the field - again making it difficult to determine whether a subsequent injury to an officer was the result of a reasonably predictable situation and/or the original basis for the call.
>
> If the principle policy upon which the firefighter's rule rests so shakily is that firefighter's can only recover when the burden on landowners/occupiers to avoid negligence is reasonable and the conduct is deterrable, extension of the rule to a profession that typically deals with unreasonable and very deterrable conduct will necessarily create an enigmatic state of law. *(citation omitted.)* **Unlike the firefighter who is**

> **well trained to fight mostly predictable fires of negligent origin, very few police functions are analogously predictable. Most exceptions to the basic firefighter's rule arise where gross negligence existed and deterrability of negligence was possible. Because a large percentage of the injuries suffered by police officers are the result of intentional or grossly negligent actions, many hazards of the police profession can be characterized as inherently unpredictable and deterrable . . .**
>
> Unlike the negligence associated with the start and the spread of fires, for which the Wisconsin Supreme Court has limited the firefighter's rule because of the great burden on landowners/ occupiers *(citation omitted)*, the negligent conduct [encountered by] police would not be as burdensome for citizens to avoid because it often involves purposeful conduct... ***Id.*** *at 2045-2046 (emphasis added).*

II. APPLICATION OF THE FIREFIGHTER'S RULE ACCORDING TO DEFENDANTS-RESPONDENTS' REASONING WOULD CREATE A DIRECT CONFLICT BETWEEN TWO EXISTING BRANCHES OF TORT LAW.

Although this Court has based the Firefighter's Rule squarely on traditional notions of public policy, it has also made mention of the known and apparent risks posed to firefighters and EMTs while performing their jobs,[2] as well as

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[2] ***Hass*** determined the duty of a landowner to be satisfied by the very nature of the call; the hazard of the fire to be the reason for the summons to duty; the call to duty to be the warning, and; the hazards readily apparent. ***Hass****, 48 Wis. 2d 321 at 324-325.* ***Clark*** determined that ***Hass*** doesn't require firefighters to be exposed to the added "risk" of hidden hazards. ***Clark****, 75 Wis. 2d 292 at 571.* ***Hauboldt v. Union Carbide Corp.****, 160 Wis. 2d 662, 476 N.W.2d 508 (1991),* determined that (continued...)

the issue of double taxation. ***Pinter*** *at ¶39.*[3]

Defendants-Respondents, quite incorrectly, have latched onto those references and focused their argument almost exclusively on how they believe police, like firefighters and EMTs, are trained to confront danger. In so doing, they dredge up concepts of assumption of risk which, while still recognized in some jurisdictions as a basis for application of the Firefighter's Rule, have long since been dismissed in Wisconsin.

A. While couching their arguments in terms of public policy, Defendants-Respondents actually employ assumption of risk principles in arguing for application of the Rule to police.

Defendants-Respondents would have their cake, and eat it too. While they claim to use "public policy" as the basis of

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[2](...continued)
Hass prohibits a firefighter from complaining about the negligence that creates the need for his or her employment. ***Hauboldt*** *at 676, quoting* ***Mignone v. Fieldcrest Mills****, 556 A.2d 35, 39 (R.I. 1989).* ***Pinter*** found that allowing actions like that in ***Hass*** would be inconsistent with the relationship of firefighting to the public - as the purpose of firefighting is to confront danger, and firefighters are hired, trained and compensated to deal with such dangerous situations. ***Pinter****, 2000 WI 75 at ¶39, citing* ***Thomas v. Pang****, 72 Haw. 191, 811 P.2d 821, 825 (1999).*

[3] Citing ***Hauboldt***, ***Pinter*** stated that "It would contravene public policy to permit a firefighter to recover damages from an individual who has already been taxed to provide compensation to injured firefighters." However, ***Hauboldt*** referenced double taxation only to explain the holding in ***Mignone***; ***Hauboldt*** did not adopt double taxation as a premise for application of the Firefighter's Rule, and specifically found that argument unpersuasive as far as Union Carbide was concerned. ***Hauboldt****, 160 Wis. 2d 662 at 677.* ***Hauboldt's*** conclusion was logical, given that double taxation is readily allowed in a wide variety of contexts (e.g., all municipal employees - other than firefighters and, after ***Pinter***, EMTs - for whom the public is taxed to provide workers compensation benefits, are allowed to maintain third-party negligence actions for injuries suffered while employed).

their argument to expand application of the Rule to police, their argument is, at its core, based upon assumption of risk principles. They utilize the various pronouncements in ***Hass***, **Clark**, ***Hauboldt*** and ***Pinter***, *supra note 2*, as a basis to argue for expansion of the Rule, based upon risks inherent to the firefighting, EMT and police professions. In so doing, they employ the same logic as jurisdictions acknowledging the use of assumption or risk.[4]

Surprisingly, even since the widespread acceptance of comparative negligence, assumption of risk principles have continued to be used by jurisdictions <u>*other than Wisconsin*</u>, as a basis for application of the Firefighter's Rule. As recognized in a secondary source cited in ***Pinter***:

> . . . courts and commentators draw a distinction between "primary" and "secondary" assumption of risk. Harper & James *(citation omitted)* explain the difference between the two: 1) <u>In its ***primary sense*** the plaintiff's assumption of risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk . . . In such a case [the] plaintiff may not recover for his injury even though he was quite</u>

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[4]The California Court of Appeals recently used the concept of "primary assumption of risk" in applying the Firefighter's Rule to an injured police officer, stating: "[T]he doctrine of assumption of risk properly bars a plaintiff's claim only when it can be established that, <u>because of the nature of the activity involved and the parties' relationship to the activity, the defendant owed the plaintiff no duty of care</u>" and "public policy preclud[es] recovery for those who are injured by the very hazard they have been employed to confront." ***Farnam v. State of California***, *84 Cal. App. 4th 1448, 1455 (2000) (emphasis added).*

> reasonable in encountering the risk that caused it . . .; 2) A plaintiff may also be said to assume a risk created by the defendant's breach of duty towards him, when he deliberately chooses to encounter that risk [i.e., ***secondary*** assumption of risk].
>
> Firefighters, courts have said, do not assume the risks in a secondary sense (on a fact-specific, hazard by hazard, fire by fire, basis), but rather in the broad primary sense, which is intrinsic in the occupation. This primary assumption of risk means that by entering into the profession, a firefighter assumes certain dangers inherent in the profession. The fighting of negligently-caused fires and the regular risks associated with such efforts (e.g., burns, smoke inhalation, structural collapse) are part of the job, and a firefighter is expected, and paid, to confront these hazards. *1992 Wis. L. Rev. 2031 at 2036 (emphasis added).*

Defendants-Respondents' argument boils down to this: because police are, like firefighters and EMTs, trained and paid to confront danger, there are certain risks inherent in the police profession which, if they result in injury, should bar an officer from maintaining a cause of action in negligence. Following that line of reasoning, Wisconsin's verison of the Firefighter's Rule would, necessarily, have defined the contours of the legal duty owed by negligent fire-starters to injured firefighters, as a function of the nature of the activity in which the defendant was engaged and the relationship of that defendant and the injured plaintiff to

that activity. If this Court adopts that reasoning, it would mean that Wisconsin's verison of the Firefighter's Rule is not, as previously asserted, based upon traditional public policy, but rather on implied/primary assumption of risk principles.

B. If, following Defendants-Respondents' logic, application of the Rule is based on implied/primary assumption of risk principles, then the Rule would conflict with *Polsky v. Levine*.

If Wisconsin's version of the Firefighter's Rule is - as urged by the Defendants-Respondents - premised upon the risks inherent to the profession, ***see supra note 2,*** then this Court is faced with a situation where two "branches" of tort law are in conflict; the Firefighter's Rule would necessarily be in direct conflict with the line of cases beginning with ***Polsky v. Levine,*** *73 Wis. 2d 547, 243 N.W.2d 503 (1976)* which, six years after ***Hass,*** abrogated the Doctrine of Implied Assumption of Risk.

As such, if this Court accepts Defendants-Respondents' argument that the Rule should extend to police because they are trained to confront danger, then the public policy behind Wisconsin's Firefighter's Rule would, necessarily, require reconciliation with this Court's abrogation of the Doctrine of Implied Assumption of Risk.

C. If the Rule were to be based on implied/primary assumption of risk principles, then it will logically be applied in unintended and undesirable ways.

Following Defendants-Respondents' reasoning would easily allow application of the Rule to a wide variety of plaintiffs who, under Defendants-Respondent's "version" of the Rule, would reasonably be required to assume the risks inherent in their profession, and who are compensated via public taxation not only to take such risks, but also by means of worker's compensation meant to cover injuries received as a result of such risks. For example:

* A state employed highway worker, injured by a negligent motorist while performing routine highway maintenance;

* A Department of Natural Resources warden injured by the negligent actions of a hunter with whom he came in contact;

* A Milwaukee Public School safety official (i.e., security guard) injured due to the negligence of unruly students, and;

* A municipal building inspector injured as a result of, and while inspecting, a negligently maintained building.

III. REFUSING TO APPLY THE FIREFIGHTER'S RULE TO POLICE AVOIDS THE CONFLICT BETWEEN THE FIREFIGHTER'S RULE AND THIS COURT'S ABROGATION OF THE DOCTRINE OF IMPLIED ASSUMPTION OR RISK.

Assuming this Court has no interest in overturning almost thirty years of precedent in two significant lines of tort law, and does not desire the subsequent application of the Rule to such unintended professions as set forth above, this Court can maintain the viability of the Firefighter's Rule to the extent thus far applied, by: 1) not accepting Defendants-Respondents' reasoning as to the basis of the Rule; 2) clarifying the public policy underpinnings of the Rule, and; 3) refusing to expand its application to police on the following grounds:

* The public policy in ***Hass*** and ***Pinter*** was, at its core, premised on the social goal of prohibiting those performing rescue operations from seeking damages from the person(s) who negligently caused the need for rescue, so as to prevent tort law from interfering with the greater social good of rapid rescue responses (i.e fire suppression and medical assistance);

* The aspect of confrontation of danger - and the corresponding Doctrines of Implied Assumption of Risk and/or Primary Assumption of Risk - were never the basis for application of Wisconsin's Firefighter's Rule (withdrawing any prior language to the contrary), and;

* The premise underlying application of Wisconsin's Firefighter's Rule does not apply to police, given the stark contrast between the purpose, duties and obligations of firefighters and police.

CONCLUSION

For all the reasons stated in this and Officer Cole's primary brief, she respectfully requests this Court not expand the Firefighter's Rule to police. In the alternative, she requests this Court allow her claims to proceed to trial under recognized exceptions to the Rule.

Dated this 25th day of June, 2003.

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)and(c), Stats., for a reply brief produced with a monospaced font. The length of this brief is 13 pages.

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STATE OF WISCONSIN
SUPREME COURT

JULIA COLE,
Plaintiff-Appellant,

CITY OF MILWAUKEE,
Involuntary Plaintiff,

vs. Case No. 02-1416

YVONNE L. HUBANKS AUBREY HUBANKS, and
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendants-Respondents.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR MILWAUKEE COUNTY, THE HONORABLE WILLIAM J. HAESE,
PRESIDING, CASE NO. 01-CV-007770

ON CERTIFICATION FROM THE COURT OF APPEALS,
DISTRICT I, CASE NO. 02-1416

NON-PARTY AMICUS CURIAE BRIEF OF INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, AND NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

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INTRODUCTION

This is an *amicus curiae brief* in support of the plaintiff-appellant's position that the Firefighter's Rule not be extended to police officers. This brief is filed on behalf of the International Union of Police Associations, AFL-CIO ("IUPA"), and the National Association of Police Organizations ("NAPO"), who together represent over 330,000 police officers in over 450 police organizations. The 330,000 law enforcement officers represented are greatly interested in the issue before the Court because it directly impacts our members.

ARGUMENT

1. THE FIREFIGHTER'S RULE ITSELF HAS A WEAK LEGAL POLICY FOUNDATION

The Firefighter's Rule was born over 100 years ago in the state of Illinois. Speiser, Krause & Gans, The American Law of Torts Sec 14:67 (1987); Gibson v Leonare, 143 Ill. 182, 32 N.E. 182 (1892). It was adopted by Wisconsin 78 years later. Hass v. Chicago and N.W. Ry. Co., 48 Wis. 2d 321, 179 N.W.2d 885 (1970). In Illinois it stood for the simple proposition that one who comes to extinguish a blaze may not recover from a landowner for his injuries sustained on the landowner's property because the landowner owes no duty to make his premises safe to a mere licensee. Wisconsin in adopting the Rule expanded it to prevent recovery against those who negligently caused a fire and failed to exercise due care in preventing its

spread, regardless of their ownership of the land upon which the blaze began.

At about the time of the adoption of the Rule in Wisconsin, when the Firefighter's Rule was developing somewhat chaotically, William L. Prosser, in his classic Hornbook, *Handbook of The Law of Torts* (4th Ed. 1971), struggled with the Rule. After review of the mixed law on the Rule, Professor Prosser wrote:

> There always has been something of an absurdity about these decisions. [referring to decisions about firemen and police officers being licensees rather that invitees] It is of course quite foolish to say that a fireman who comes to extinguish a blaze or a policeman who enters to prevent a burglary confers no pecuniary benefit upon the occupier; and if invitation is called for, it is at least clearly present when he comes in response to a desperate call for help. The argument, occasionally offered, that tort liability might deter landowners from uttering such cries of distress is surely preposterous rubbish. It is quite true, as has been pointed out, that injuries to firemen and policemen are covered by compensation and pension funds; but this is no less true of other public employees mentioned above, or even of many private employees who are held to be invitees.

Id. at 397.

After over one hundred years of development, no persuasive public policies have developed to support the Rule, nor to support extending the Rule to police officers. The prevailing policy arguments commonly advanced in support of the Rule by courts are:

A. That the salaries and worker's compensation as well as post injury benefits paid to firefighters is sufficient to compensate them for the risks

they take in fighting fires. The public would be double taxed if property owners were required to compensate firemen for their injuries on their property;

B. Permitting liability would place too great a burden upon property owners to keep their property in a safe condition;

C. An explosion of litigation would ensue were firefighters permitted to sue property owners for their injuries;

D. Allowing firefighters to recover for injuries would discourage the public from calling for help in an emergency; and

E. Assumption of risk.

1992 Wis. L. Rev 2031, 2035-2038.

None of these policies can be applied either alone or together to support the conclusion that police officers while performing their duties should be effectively disenfranchised from the tort system sui generis by the extension of the Rule to them.

A. That the salaries and worker's compensation as well as post injury benefits paid to firefighters is sufficient to compensate them for the risks they take in fighting fires. The public would be double taxed if property owners were required to compensate firemen for their injuries on their property.

Most workers are covered by worker's compensation insurance. There is no reason to believe that police officers are compensated more or differently than other classes of government or private sector employees having similar duties that put them

in harms way in the performance of their duties, e.g. public safety officers, building inspectors, OSHA inspectors, workers restoring utility service and postal workers. At least one court, in rejecting application of the Rule to sanitation workers, observed that those workers, like firefighters and police officers, receive added job benefits, including unlimited sick leave, line of duty injury status and corresponding benefits if injured on the job. Ciervo v City of New York, 93 N.Y.2d 465, 468, 715 N.E.2d 91 (N.Y. 1999).

Of particular relevance to this case are U.S. postal workers. Who else encounters loose dogs more frequently in the course of their duties than postal workers delivering our mail? Yet no such immunity from liability has developed disenfranchising our Nation's letter carriers from the tort system.

In rejecting the Rule, the Oregon Supreme Court felt that it was inequitable to apply the Rule to limited classes of workers:

> [by] denying a public safety officer recovery from a negligent tortfeasor, the officer is not directed to recover his damages from the general public; rather the officer is totally precluded from recovering these damages from anyone. Contrast this with other public employees who are injured when confronting dangers on their jobs. The latter can recover workers' compensation and salary benefits from the public, but are also allowed additional tort damages from the third-party tortfeasors. Under the 'fireman's rule' the injured public safety officer must bear a loss which other public employees are not required to bear.

Christensen v. Murphy, 296 Or. 610, 619-620, 678 P.2d 1210 (1984); cited with approval in Hopkins v. Medeiros, 48 Mass.App.Ct. 600, 724 N.E.2d 336, 343

(Mass.Ct.App. 2000).

B. Permitting liability would place too great a burden upon property owners to keep their property in a safe condition.

Similarly, regardless of the merits of the policy of not burdening property owners to prevent dangerous conditions on their property, or for that matter the burden upon drivers of automobiles, as was the policy consideration in Pinter v. American Family Insurance Co., 236 Wis. 2d 137, 613 N.W. 2d 110 (2000), the footing for this policy applies equally to the other classes of public and private employees who encounter dangerous conditions in the course of their duties. Thus the Rule should be applied, if at all, to all such employees, and not solely to police officers and firefighters.

Even this Court recognized in its dissenting opinion in Pinter that the public policy arguments unpinning that decision's majority ruling "[s]eems to apply to a host of paid employers and volunteers, both in public and private service." Id. at 160.

C. An explosion of litigation would ensue were firefighters permitted to sue property owners for their injuries

While abolishing or limiting the Rule to firemen may lead to an increase in the number of claimants who will be permitted to pursue claims against the citizens they are employed to protect, it does not necessarily follow that there will be an increase in litigation. The confused and inconsistent application of a rule which has prevailed in the courts of this country has led to a proliferation of claimants litigating whether the

Rule applies to their claim or, if it does, whether any of the inconsistent exceptions apply to.

This case, only three years after this Court last addressed the Firefighter's Rule in Pinter, and only two years after the Court of Appeals addressed the Rule in Mullen v. Cedar River Lumber Co., 246 Wis. 2d 524, 630 N.W. 2d 574 (Ct.App. 2001), is evidence of the proliferation of litigation caused, rather than prevented, by the Rule.

Expanding the Firefighter's Rule to police officers will increase litigation by encouraging tort defendants to seek to escape liability by litigating whether the plaintiff's employment duties fit within the overly broad policy considerations of the Firefighter's Rule.

D. Allowing firefighters to recover for injuries would discourage the public from calling for help in an emergency.

There is no evidence that eliminating or limiting the Rule will lead to a reluctance of citizens calling for help when it is needed because of fear of being sued. It is hard to imagine a citizen in need of emergency assistance, provided that they would be aware of the Rule at all, contemplating the subtleties of the Rule and its many inconsistent exceptions before calling. It is probably fair to say that most attorney's are unaware of the Rule.

Professor Prosser labels this argument simply "preposterous rubbish". Prosser, *supra* at 397.

E. Assumption of risk.

The assumption of risk rule is no longer a bar per se to liability in negligence jurisprudence. See Wright v. Coleman, 148 Wis. 2d 897, 904, 436 N.W.2d 864 (1989).

While it is recognized that the Firefighter's Rule is of long standing in this country and has been undisturbed by the Legislature in Wisconsin since its inception, there is no persuasive public policy which compels expanding the doctrine. Wisconsin wisely refused to extend the Rule to a public safety officer in Mullen and should refuse to extend it to include police officers.

2. EXCLUDING POLICE OFFICERS FROM THE FIREFIGHTER'S RULE DOES NO HARM TO WISCONSIN'S PRIOR APPLICATION OF THE RULE.

The court's adoption of the Firefighter's Rule in Haas was in the context of a firefighter making a claim against a landowner for having started a fire which injured the firefighter. It cautiously limited its decision. "We do not by this decision venture into other areas of negligence where liability is based upon something more than the negligent starting of a fire." Haas at 327.

Pinter veered from the course set by Hass by barring a claim unrelated to the ownership or occupation of land and unrelated to starting of a fire. Pinter, however, notwithstanding its departure from the caution urged by Haas, did not extend the Rule beyond firemen sui generis. No other Wisconsin case has applied the Rule to prevent

a claim by a non-fireman. Pinter was a firefighter and an EMT employed by the City of Brookfield. Pinter at 142. The Court chose to bring EMT / firefighters within the penumbra of the Rule because unlike police officers, both are "professional rescuers who are professionally trained and employed to conduct rescue operations in dangerous situations." Pinter at 43.

Thus, excluding police officers from the Firefighter's Rule is consistent with limiting the Firefighter's Rule to EMT's / firemen.

3. SINCE THIS COURT'S DECISION IN PINTER, THERE HAS BEEN GROWING DISCONTENT WITH THE RULE IN OTHER STATES.

Recognizing that the Firefighter's Rule's policy footing is weak, several states have undertaken by judicial decision to reject the Rule and by legislation to either eliminate or diminish its applicability. Many of these states were recognized by the Pinter court. See Pinter at 152 FN7[1].

1 The Pinter Court recognized the following jurisdictions which have recently abolished the Rule by judicial decision or statute. "Wills v. Bath Excavating and Constr. Co., 829 P.2d 405, 408-09 (Colo.Ct.App. 1991) (concluding that the Colorado Supreme Court has abandoned the Firefighter's Rule); Hopkins v. Medeiros, 48 Mass.App.Ct. 600, 724 N.E.2d 336, 343 (2000) (concluding that the Firefighter's Rule has no continuing vitality in Massachusetts); Christensen v. Murphy, 296 Or. 610, 678 P.2d 1210 (1984) (rejecting the Firefighter's Rule). See also Fla. Stat. ch. 112.182 (1999) (abolishing the Firefighter's Rule); Minn. Stat. § 604.06 (1999) (same)."

This Court also recognized the criticism and dissent which this Rule has engendered. See Pinter at 152 FN8[2]. In fact, the opinion in Pinter contains its own criticism in its dissenting opinion. Pinter at 159

Since Pinter, South Carolina in tandem decisions flatly rejected the Rule after discarding the public policy arguments frequently advanced for it. Minnich v. Med-Waste, 349 S.C. 567, 564 S.E.2d 98 (2002); and Trousdell v Cannon, 351 S.C. 636, 572 S.E.2d 264 (2002). It rejected as insufficient policy underpinnings for the Rule the following: (i) firefighters and policemen are adequately compensated for injuries by workers' compensation insurance, (ii) firemen and policemen unlike invitees or licensees, enter premises at unforeseeable times not open to the public where it is unreasonable to require the same level of care owed to invitees or licensees, and (iii) firefighters and policemen are adequately compensated and citizens would incur excessive cost by both paying the compensation as well as the damages sustained by firemen and policemen injured on the job. Minnich at 100-103

The South Carolina Court took particular note of the lack of uniform justification for and application or the Rule. "[t]hose jurisdictions which have adopted the Firefighter's Rule offer no uniform justification therefor, nor do they agree on a

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2 The Pinter court recognized the following criticism of the Rule: "See, e.g., Edwards v. Honeywell, Inc., 50 F.3d 484, 491-92 (7th Cir. 1995); Waggoner v. Troutman Oil Co., 320 Ark. 56, 894 S.W.2d 913, 916-19 (1995) (Roaf, J., dissenting); Walters v. Sloan, 20 Ca.3d 199, 142 Cal.Rptr.. 152, 571 P.2d 609, 614-20 (1977) (Trobriner, Acting C.J., dissenting), abrogated in part by Neighbarger v. Irwin Indus., Inc., 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347 (1994) and superseded in part by statute in Cal. Civil Code § 1714.9 (West 1999); Thomas v. Pang, 72 Haw. 191, 811 P.2d 821, 826-28 (1991) (Padgett, J. dissenting); David L. Strauss, Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years,

consistent application of the Rule. The Rule is riddled with exceptions, and criticism of the Rule abounds." Minnich at 103. The court also pointed out the discriminatory nature of the Rule - "We are not persuaded by any of the various rationales advanced by those courts that recognize the Firefighter's Rule. The more sound public policy – and the one we adopt – is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment."

Maine, also noting the scant justification for the Rule, refused to adopt it. Holmes v. Adams Marine Center, 2000 Me. Super. LEXIS 162. In rejecting the Rule, the court decided that "recognizing the Firefighter's Rule now in Maine would not be logical. First, original justification for the Rule has long since been abandoned by Maine courts. Second, the formulation of such a broad exclusion to a common law cause of action by the courts is improper and should be left to the legislature." Holmes at 7.

4. THIS IS NO TIME IN OUR HISTORY TO REDUCE THE PROTECTION AFFORDED WORKING POLICE OFFICERS.

Police and policing are now under particular stress. Since 9/11/01, their vital role in the Nation's security has been universally accepted. The demand for their services has increased greatly, yet with no additional funding or financial support. Law enforcement's role is expanding, particularly in the areas of security and anti-terrorism. New demands in both the type of security work required and the time

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1992 Wis. L. Rev. 2031, 2059-2062."

required to perform it press on every day. This is in the face of decreasing financial support in some jurisdictions and stagnant support in others. Law enforcement is being asked to perform expanded services without additional support. This is not the time for a court to reduce the protection afforded police officers injured in the performance of their duties.

5. THE JOB OF POLICING IS UNIQUELY DIFFERENT FROM THAT OF FIREFIGHTING AND EMERGENCY MEDICAL SERVICES.

This Court in continuing the Firefighter's Rule in Pinter did so because of the similarity of firemen and EMT's, noting that some EMT's serve as firefighters and that both are specifically trained to conduct rescue operations in dangerous conditions. Pinter at 156. Police officers encounter essentially random types of emergencies and have only generalized training.

Taking a patrol officer as best representing the many jobs performed by "law enforcement," the work of a patrol officer is very different from that of a firefighter. A patrol officer typically works one of three 8 to 10 hour shifts. The officer arrives at work and attends a 10 or 15 minute roll call providing training and reviewing the coming day's activities. He then leaves his station house of central work location, gets in a police vehicle and patrols his assigned area in the community for his entire shift. While on patrol, the officer performs security, engages in community policing, and on occasion responds to calls for help of standard law enforcement. He returns to

his station at the end of the shift and goes home. Periodically, the officer receives specific training but essentially relies on experience and the original cadet training at a police academy. He receives training on an irregular basis.

This is quite different than the work of a firefighter. The firefighter reports to the fire house for a one or two day tour of duty during which time he lives, eats, sleeps and spends all of his time with his fellow firefighters. The fire house may receive three or four calls over the entire shift; the remainder of a tour of duty is spent in physical and firefighter training, including repeated exercises concerning the responses necessary to disaster at a fire scene. This experience is entirely different than that of a police officer. Both firefighters and EMT's are professionals whose job and extensive daily training in rescue include clarity about risk and the Firefighter's Rule. They are employed in rescue operations in dangerous emergencies. Both the constant training and anticipation of risks lie at the foundation of the Rule. Neither are true in policing.

CONCLUSION

There are insufficient public policy considerations to permit discrimination against police officers by disenfranchising them from the tort system in Wisconsin without applying the Rule to other classes of public and private employees described elsewhere in this Brief. To do so violates the fundamental principles of equal protection and fairness. The IUPA and NAPO respectfully request that this Court

refuse to expand the application of the Firefighter's Rule sui generis to police officers injured in the course of their employment, in situations like the case at bar.

Dated this 30th day of July, 2003.

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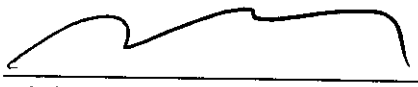
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for a nonparty brief produced with a proportional serif font. The length of this brief is 2,813 words.

Dated: July 30, 2003



Richard A. Frederick

SUPREME COURT
STATE OF WISCONSIN
APPEAL NO. 02-1416

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS AND
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

NON-PARTY AMICUS CURIAE BRIEF OF THE OF THE MILWAUKEE POLICE ASSOCIATION AND POLICE OFFICERS DEFENSE FUND, ET AL.

CERTIFICATION ACCEPTED FROM
COURT OF APPEALS, DISTRICT ONE, CASE NO. 02-1416

APPEAL FROM AN ORDER OF
THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE WILLIAM J. HAESE, PRESIDING
MILWAUKEE CIRCUIT COURT CASE NO. 01-CV-007770

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ARGUMENT

I. THE FIREFIGHTER'S RULE, AS ADOPTED IN WISCONSIN, DOES NOT AND SHOULD NOT APPLY TO POLICE OFFICERS.

A. The Firefighter's Rule was created as a *limited* exception to negligence law.

Over thirty years ago, the Court created an exception to the general principles of negligence law, barring recovery by an injured firefighter against a railroad that negligently caused a fire. Hass v. Chicago & N. W. Ry. Co., 48 Wis. 2d 321, 322-23, 179 N.W.2d 885, 886 (1970). The common law exception was extremely limited. In that case, a volunteer firefighter was injured when he was summoned to put out a fire that was negligently started by a railroad company. The Court found that there was negligence but stated that public policy does not permit a firefighter to recover against a tort-feasor whose only negligence is in starting a fire and failing to curtail its spread. Id. at 327, 179 N.W.2d at 888.

The Court based its decision on policy grounds, asserting that "to make one who negligently starts a fire respond in damages to a firefighter who is injured is likely to place too great a burden on homeowners and other occupiers of real estate." Id. at 326, 179 N.W.2d at 888 (quoting Colla v. Mandella, 1 Wis. 2d 594, 598, 599, 85 N.W.2d 345, 348 (1957)). Further, the court reasoned that to find liability in such a case would be to enter a field that has no sensible or just stopping point. Id. Nonetheless, the Court strictly confined the holding to

cases that involve firefighters. Id. at 327, 179 N.W.2d at 888. Further, the Court cautioned that there could be many instances where a firefighter would not be barred from collecting against a negligent tort-feasor. Id.

B. Pinter is distinguishable from the present case.

Later, the Court expanded the firefighter's rule to include emergency medical technicians (EMTs). Pinter v. Am. Family Mut. Ins. Co., 236 Wis. 2d. 137, 141, 613 N.W.2d 110, 111 (2000). Pinter reaffirmed the policy reasons set forth in Hass, concluding that allowing the cause of action would place too great a burden on the public, and finding liability in such a case would enter a field with no sensible stopping point. Id. at 146, 613 N.W.2d at 113.

The Court also stated that firefighting and emergency medical assistance are closely related professions. In fact, Pinter himself was a firefighter as well as an EMT. Both firefighters and EMTs are "professional rescuers who are specially trained and employed to conduct rescue operations in dangerous emergencies." Id. at 156, 316 N.W.2d at 118. Further, Pinter had participated in at least two hundred similar rescues and was, therefore, trained for such an emergency rescue operation. Thus, the Court concluded that Hass should extend to Pinter's cause of action and preclude recovery by EMTs in negligence cases. Like the Court decided in Hass, allowing recovery in such a case would contravene public policy.

To more fully understand why the policy considerations set forth in Hass apply to Pinter and not to the present case, it is worthwhile to examine the facts of Pinter. In that case, there was a car accident that was the result of negligence. The EMT sustained injuries while providing emergency medical assistance to a passenger who was injured in the accident. The EMT suffered from an inguinal hernia as the result of having to assume an awkward position while attempting to extract the victim from the car. Id. at 142, 613 N.W.2d at 112.

However, the relationship between the EMT's injury and the negligent operation of the vehicle was tenuous at best. The hernia was a result of the way the EMT was holding himself. According to the Court, the injury was "too remote" and permitting recovery would allow for "no sensible or just stopping point." Id. at 158, 613 N.W.2d at 119. It would be nearly impossible for the operator of a motor vehicle to foresee such a hazard. Further, though traffic laws were created for the safety of the public at large, it would be a stretch to say that legislators intended such laws to protect the public from back injuries sustained while holding awkward positions during rescue attempts necessitated by negligent drivers.

To the contrary, Julia Cole sustained injuries that were the direct result of the owners' negligent keeping of

their dog.[1] Dog bite statutes were created to protect the public from dogs and other pets. The relationship between the negligent behavior and the injury is not the least bit tenuous in this case, and certainly the injury is not "too remote from the negligence" as the Court stated in Pinter. 236 Wis. 2d at 146, 613 N.W.2d at 113 (quoting Hass, 48 Wis. 2d at 326, 179 N.W.2d 885).

Furthermore, dog bite statutes impose strict liability, which indicates the public's desire to hold owners accountable for the actions of their pets. See Wis. Stats. § 174.02. There is no reason to believe that the dog bite statutes were intended to protect everyone except police officers and other public servants. The courts have recognized exceptions to the firefighter's rule when a homeowner violates a statute or ordinance under which the firefighter was within the scope of protection. Clark v. Corby, 75 Wis. 2d 292, 300, 249 N.W.2d 567, 571-72 (1977). Here, the defendants-respondents violated a statute to the detriment of Julia Cole, and they should be held accountable for that violation.

Clearly, the primary functions of police officers are different from those of firefighters. Firefighters specialize in rescue operations, whereas police officers specialize in law enforcement. More than that, though, the occupations differ in a way that makes it inappropriate to

[1] Respondents also failed to warn of the dangers of their dog and violated Wisconsin Statutes and municipal codes. See Wis. Stats. § 174.02 (2002), Milwaukee Code of Ordinances § 78-3 (2002).

expand the firefighter's rule to police officers. Firefighters are usually summoned to private residences or buildings to extinguish fires. The courts recognized that to hold homeowners liable for negligent behavior that calls a firefighter into their own private residence contravenes public policy.

Unlike firefighters, police officers, such as Julia Cole, often come upon crimes by chance. In those instances, the officer is called to duty in a public place, where any ordinary citizen could be in the same position. The fact that police officers may have some job characteristics similar to firefighters is not enough to expand the firefighter's rule, which was a limited exception to the principles of negligence law, created specifically for firefighters as rescue personnel.

C. The Firefighter's Rule was meant to apply only to emergency rescue personnel in specific situations, not as a blanket rule for all public servants.

Rules of law must be applied uniformly and consistently in order to be effective. Riddled with exceptions, the firefighter's rule is already inconsistent in many respects, and expanding the rule to apply to police officers would only increase the uncertainty associated with the rule.[2] If the rule is applied to police officers, then the rule itself will have no sensible and just stopping place. The Respondents argue that the rule was meant to apply to police

[2] *See* Clark, 75 Wis. 2d 292, 249 N.W.2d 567 (1977), Wright v. Coleman, 148 Wis. 2d 897, 436 N.W.2d 884 (1989), Hauboldt v. Union Carbide, 160 Wis. 2d 662, 467 N.W.2d 508 (1991) for specific exceptions.

officers because of the similarities between the two professions, Respondent's Brief at p. 15, and that expansion of the rule will not result in more litigation. Respondent's Brief at p. 29. At the same time, however, Respondent argues that "expansion of the firefighter's rule to police officers is a *logical step in the development of the firefighter's rule.*" Respondent's Brief at p. 13 (emphasis added). If this expansion of the rule is a "logical step," then expansion to other public servants is the next logical step. The fact is that even Respondent implicitly acknowledges that expansion of the rule to include police officers will open a door to further debate over the extent of its application.

Following the Respondents' logic, one must look to the similarities of the two professions to determine if the firefighter's rule should extend to police officers. Noting that Respondents reject Petitioners argument that the Courts have applied the rule only to professions whose primary functions are rescue operations, the only proffered similarities of the two professions are that they are both public servant positions and they both know they are expected to provide aid and protection in hazardous circumstances. Given that logic, the rule should be applied to numerous public servant positions. After all, if we are to apply the rule to police officers, then why not apply the rule to highway workers?

Oftentimes, highway workers and police officers perform the same functions with the same risks. See David L. Strauss, Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years, Wis. L. Rev. 2031, 2051 (1992). For instance, both occupations, at times, call for the directing of traffic. Both highway workers and police officers rely on drivers to obey the rules of the road for their safety; yet, if the firefighter's rule is expanded, then a negligent driver could injure one of them and get sued but injure the other and be shielded by the firefighter's rule.

The fact is that many public servants assume risks for the benefit of the public. City electricians, building inspectors, public works employees, teachers, and many others are often put in danger, as part of their employment, due to someone's negligent act(s). Nonetheless, it has not been proposed that such public servants should be prevented from recovering from a negligent tort-feasor upon injury. It has never even been suggested by the courts that the firefighter's rule was meant to apply to firefighters because they are public employees. In fact, in Hass, the firefighter was a volunteer, not a public employee. 48 Wis. 2d at 322, 179 N.W.2d at 886. As Chief Justice Abrahamson stated in her dissenting opinion in Pinter:

> The number of factual scenarios to which the majority's reasoning can be applied is troubling. . . . I do not think that the law of negligence or that public policy considerations favor holding that a tortfeasor has complete immunity from liability based on the plaintiff's occupation.

236 Wis. 2d at 161, 613 N.W.2d at 120 (footnote omitted). To apply the firefighter's rule to police officers and other public servant positions would be arbitrary and unfair. Again, the firefighter's rule was adopted as a limited exception to the otherwise broad common law negligence principles.

The Respondents would have the courts believe that the rule applies to police officers because, like firefighters, they are public servants. However, if the rule is continually expanded to include certain public servants, such as police officers, then there is inconsistency in the law. This type of inconsistency will inevitably lead to increased litigation in the court system. If the rule is expanded, then it is very likely that negligent tort-feasors will capitalize on that expansion and attempt to use the firefighter's rule as a shield against liability when any public employee is harmed as a result of negligence.

Thus, the firefighter's rule will become a common law doctrine that will be applied on a case by case basis. This cannot be the result that the court intended in Hass when it "merely" held that "one who negligently starts a fire is not liable for that negligence when it causes injury to a firefighter who comes to extinguish the blaze." Hass, 48 Wis. 2d at 327, 179 N.W.2d at 888.

II. PUBLIC POLICY DOES NOT SUPPORT EXPANSION OF THE FIREFIGHTER'S RULE TO POLICE OFFICERS.

A. Holding the public to the standard of ordinary care is not an unreasonable burden.

The Court found that expansion of the firefighter's rule to EMTs was appropriate; however, the public policy reasons set forth in Pinter for extending the firefighter's rule are the very reasons why, here, the rule should not be extended. The reasons given in Pinter were that permitting recovery would "place an unreasonable burden on drivers who negligently caused collisions," that the injury sustained by the plaintiff was "too remote from the initial acts of negligence that caused the collision" and finally, that allowing the action to continue "would enter a field with no sensible or just stopping point." 236 Wis. 2d at 146, 613 N.W.2d at 113. Such policy concerns do not apply here.

First, placing liability on a dog owner whose negligence causes a victim to be injured by his/her dog is not an "unreasonable burden," even when the victim is a police officer. Both real estate and automobiles are possessions that are necessary for most people to function in their lives. Pets are not of the same category. With very few exceptions, when people acquire pets, they do so for reasons other than necessity and/or functionality.

Pet owners voluntarily put themselves in the position of having greater exposure to liability. Essentially, dog owners buy their pets because they believe the benefit outweighs the probability that the dog will injure someone. Public policy does not and should not prohibit the public from paying for their own voluntary, risk-taking behavior. To illustrate that point, one can look at the statutes and

ordinances relating to dog bites. As previously mentioned, dog bite statutes impose strict liability on dog owners. See Wis. Stats. § 174.02 (2002). The public is obviously aware of the inherent hazards in owning a pet, and it cannot be "too burdensome" to hold dog owners to the standards imposed by law merely because a police officer was injured by their stray dog and not an ordinary citizen.

Second, the rule recognized in Hass is an expression of public policy because it prohibits a firefighter from "complaining about the negligence that creates the very need for his or her employment." Hauboldt v. Union Carbide, 160 Wis. 2d 662, 676, 467 N.W.2d 508 (1991) (quoting Mignone v. Fieldcrest Mills, 556 A.2d 35, 39 (R.I. 1989)). The Court based that reasoning on the fact that "most fires are started by acts of negligence." In fact, the primary function of a firefighter is to extinguish fires. Therefore, the policy makes sense, as the Court reaffirmed in Pinter, 236 Wis. 2d at 154, 613 N.W.2d at 117.

However, the primary function of a police officer is to enforce the law. It has not been asserted that most violations of the law are the result of negligent acts. In fact, the opposite is probably true. Many criminal acts are committed with intent to violate the law. Thus, the same policy that applies to firemen cannot apply to police officers regarding negligent acts. A lack of negligent behavior would not likely significantly diminish the public's need for police officers. Because law enforcement

does not deal primarily with negligent acts, allowing recovery by a police officer for acts of negligence would not "enter a field with no sensible or just stopping point."

More likely, allowing recovery by a police officer for such acts would deter such negligent behavior. As explained above, police officers are often called to respond to situations that arise from intentional and negligent behavior (i.e. fistfights, burglaries, etc.). Such behavior could be deterred by imposing personal liability on the offenders. See Strauss supra p. 7 at 2054. Unlike most instances where fires are started negligently, conduct that police officers deal with is usually deterrable. Public policy should act to help deter such conduct, not to protect the offenders of such conduct.

B. Mere knowledge of the inherent risks associated with being a police officer is not enough to bar recovery by a police officer who has been injured as a result of negligent behavior.

The Respondents' argument is centered on the characterization of police officers as similar to firefighters and EMTs in that they are all expected to provide aid and protection in hazardous circumstances. However, using this characterization as a basis for the expansion of the rule is disturbing because it is couched in terms of public policy but implicitly relies on the doctrine of implied assumption of risk. Respondents' argument always reverts back to the same underlying theme—that police officers should not be allowed to sue for negligence because they are aware that their job entails hazardous duties.

Such an argument is based on assumption of risk, a doctrine that has been abrogated in Wisconsin. See Polsky v. Levine, 73 Wis. 2d 547, 243 N.W.2d 503 (1976).

Respondents must rely on assumption of risk because they cannot otherwise meet the policy requirements set forth in Hass and Pinter. It is simply not an unreasonable burden to require that the public take ordinary care. The fundamental difference is that conduct that necessitates the involvement of police officers is widespread and often unpredictable, whereas conduct that necessitates the involvement of firefighters is fairly isolated (i.e. starting a fire). The firefighter's rule works for firefighters because the scope of their duties is fairly limited. On the other hand, police officers, as law enforcement officers, have a duty to enforce all laws. Expansion of the rule to include police officers would broaden the rule beyond its original purpose, which was to allow the public to report fires without fear of liability. Because the same policy reasons do not hold for police officers, the Respondents are forced to rely on the doctrine of implied assumption of risk. This Court has been adamant that the Wisconsin Firefighter's Rule is not based on the implied assumption of risk, but on grounds of public policy, see Pinter, 236 Wis. 2d at 145, 613 N.W.2d at 113; therefore, the rule cannot be expanded to include police officers.

CONCLUSION

The firefighter's rule was adopted in Wisconsin as a limited exception to the general law of negligence. When the Court adopted the rule, it did so based on public policy considerations. However, police officers are vastly different from firefighters and even EMTs. It is perfectly reasonable to expect members of the public to take ordinary care to obey laws, and when they do not take ordinary care, they should be liable to anyone who suffers injuries as a result. Therefore, we join in Petitioner's request for relief.

Dated at Milwaukee, WI, this 9th day of July, 2003.

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I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a non-party brief produced with a monospaced font. The length of this brief is 13 pages.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

COURT OF APPEALS CASE NO. 02-1416

APPEAL FROM AN ORDER OF
THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE WILLIAM J. HAESE, PRESIDING
MILWAUKEE CIRCUIT COURT CASE NO. 01-CV-007770

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the scope of Wisconsin's Firefighter's Rule inappropriately expanded to include police officers under ***Pinter v. American Family Insurance Co.***, *2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110 (2000)*, given that Milwaukee

Police Department ("MPD") officers are not specifically trained and experienced in rescue operations?

Trial Court's Answer: In the negative.

2. Does expansion of the Firefighter's Rule to police officers violate public policy as set forth in ***Hass v. Chicago & Northwestern Railway,*** *48 Wis.2d 321, 179 N.W.2d 885 (1970)* and ***Pinter,*** given that MPD officers are not specifically trained and experienced in rescue operations?

Trial Court's Answer: In the negative.

3. Was the Trial Court's finding (i.e., that the training provided by the MPD to Plaintiff-Appellant Julia Cole {"Officer Cole"} was sufficient to expand the Firefighter's Rule to police officers) clearly erroneous, given that it was not supported by the record?

Trial Court's Answer: Not addressed.

4. Was the Trial Court's finding (i.e., that Officer Cole's personal on-the-job experience in capturing stray dogs

was sufficient to expand the application of the Firefighter's Rule to police officers) clearly erroneous, given that it was not supported by the record?

Trial Court's Answer: Not addressed.

5. In the event this Court does find that the Firefighter's Rule should be expanded to encompass police officers, the question then arises whether Officer Cole's causes of action should survive a motion for summary judgment, given that they are based upon alleged violations of municipal ordinances and the defendants failure to warn, as opposed to being based "solely" on the defendants' initial acts of negligence.

Trial Court's Answer: In the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested but cannot be said to be necessary. Publication, on the other hand, would be appropriate given that this case appears to be one of first impression.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Trial Court's grant of Summary Judgment in favor of the Defendants-Respondents. ***R.19.*** In so doing, the Trial Court expanded Wisconsin's "Firefighter's Rule" to a police officer with the MPD who was mauled and seriously injured by a dog, ***R.16(@14,18)***, owned by Defendants-Respondents Yvonne and Aubrey Hubanks ("Hubanks, collectively"), after the officer had happened upon a situation where she determined it necessary to take police action. ***R.16(@9,11).***

This case involves interpretation of the purpose and scope of Wisconsin's Firefighter's Rule, and whether it should be expanded from what had been its recognized status prior to the decision of ***Pinter*** (i.e., a limited exception to the general rule of negligence immunizing landowners or occupiers who negligently start or fail to curtail the spread of a fire), so as to encompass police officers as a result of ***Pinter's*** expansion to include Emergency Medical Technicians ("EMTs").

If this Court affirms the Trial Court's expansion of the Firefighter's Rule to police officers, it will then be necessary to address whether Officer Cole's causes of action

should nonetheless survive, given that they are based on recognized exceptions to the Firefighter's Rule (i.e., failure to warn and violations of municipal ordinance).

B. PROCEDURAL HISTORY OF THE CASE

Officer Cole filed this action on August 21, 2001. ***R.1.*** Defendants timely answered on September 10, 2001. ***R.2(@1-4).*** A Scheduling Conference was held on October 4, 2001, ***R.3,*** which provided a Scheduling Order. ***R.4(@1-2).*** Officer Cole filed an Amended Complaint on October 22, 2001, ***R.5,*** to which defendants timely answered. ***R.7(@1-3).***

Defendants filed their Notice of Motion and Motion For Summary Judgment, ***R.10,*** along with their Brief in Support thereof, ***R.11,*** by letter of March 4, 2001. On March 19, 2001, Officer Cole filed her Brief in Opposition to Defendants' Motion for Summary Judgment, ***R.15,*** along with the supporting Affidavits of Bradley DeBraska, ***R.17,*** and Jonathan Cermele, ***R. 16.*** Although a hearing on summary judgment was scheduled for April 24, 2002, ***R.20,*** the Trial Court issued its decision on April 12, 2002, ***R.19,*** without benefit of oral argument. On April 29, 2002, defendants filed their Notice of Entry of Final Order. ***R.21.***

C. STATEMENT OF FACTS

On January 8, 2001, Officer Cole was traveling in a MPD squad car proceeding westbound on Villard Avenue in the City of Milwaukee, at the approximate intersection of 55th Street, when she saw a dog crossing Villard Avenue, ***R.16(@9-10)***, attached to a chain. ***R.16(@7)***. She was never dispatched to the scene, but simply happened upon the stray dog. ***R.16(@9)***.

By the time the squad car had come to a stop, the dog had crossed Villard Avenue and was walking slowly Northbound on 55th Street. ***R.16(@10)***. Officer Cole grabbed the chain with her left hand, using her right hand to beckon the dog closer; continually talking to the dog in a calm manner. ***R.16(@12-14)***. She tried at all times to be cautious so as not to scare the dog. ***R.16(@14)***.

Officer Cole estimated the dog to weigh 85-90 pounds. ***R. 16(@13)***. It appeared calm and "happy"; walking slowly toward her and wagging its tail. ***R.16(@12)***. It did not appear vicious. ***R.16(@14)***. Officer Cole squatted down and let the dog sniff her hand. ***R.16(@14)***.

Then, without warning or provocation, the dog lunged at Officer Cole's neck, knocking her to the ground and "latching on to [her] face." ***R.16(@14)***. Officer Cole was shocked. ***Id.*** She had assumed the dog would have growled, barked or shown some aggressive posture if it was going to attack. ***R.16(@15)***.

Eventually, she was able to use her left hand to push the dog off her face. ***Id.*** She unholstered her service weapon and aimed it at the dog in case it attacked a second time. ***R.16 (@15-16).*** However, the dog just sat there and stared at her. ***Id.*** At no time did the dog growl or give any indication it would attack. ***Id.*** The dog was not muzzled. ***R.19(@4).***

As a result of the attack, Officer Cole received 3 lacerations; 1 on the right earlobe, where "it was almost torn off"; one close to the right carotid artery, and; one just below the right jaw line. ***R.16(@17-18).*** She was taken from the scene by ambulance to St. Michael's Hospital where she received thirty stitches to her face and ear. ***R.16(@17).***

ARGUMENT

Section 802.08(2), STATS., provides that a party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.

Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead to only one

conclusion. ***Grams v. Boss,*** *97 Wis.2d. 332, 338, 294 N.W.2d 473, 477 (1980).*

Summary judgment was granted in this case based upon the ***Hass v. Chicago & Northwestern Railway,*** *48 Wis.2d 321, 179 N.W.2d 885 (1970),* and ***Pinter v. American Family Insurance Co.,*** *2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110 (2000),* which established a public policy limitation on the liability for firefighters and EMTs, respectively.

Whether public policy considerations preclude a particular cause of action is a question of law which this Court determines independently as a matter of law. ***Pinter,*** *2000 WI 75 @ ¶13, 236 Wis.2d 137, 613 N.W.2d 110 (2000); also,* ***Hass,*** *48 Wis.2d 321 @ 326, 179 N.W.2d 885, 888 (1970)*

The record in this case contains no factual basis to support the Trial Court's expansion of the Firefighter's Rule to police officers. Furthermore, such an expansion would be against public policy as articulated by our Supreme Court in ***Hass*** and ***Pinter.*** As a result, this Court should reverse the Trial Court's grant of summary judgment and allow Officer Cole's claims to go to trial.

1. THE TRIAL COURT IMPROPERLY EXPANDED THE APPLICATION OF "THE FIREFIGHTER'S RULE" TO POLICE OFFICERS

A. Origin of the Firefighter's Rule in Wisconsin

The Firefighter's Rule was initially adopted as a result of ***Hass v. Chicago & Northwestern Railway.*** There, a firefighter was injured when he *responded* to a fire which was allegedly caused by the negligence of a railroad. The plaintiff firefighter sued the railroad, alleging general negligence. The Court dismissed both claims, reasoning that the hazards of fire were apparent and the landowner had no duty to warn a firefighter. The Court stated:

> *The hazard of fire feared by the landowner and for which he asks aid in fighting is the very reason for the summons to duty*. The call to duty is the warning of the hazard; and even *in the absence of a summons by the occupier of the land, the hazards of the fire are apparent* . . . the duty of a landowner to a firefighter in respect to a warning of the hazard is satisfied by the very nature of the call for assistance. ***Hass*** *@ 324-325, 179 N.W.2d 885, 887. (emphasis added).*

Hass then held that one who negligently starts a fire cannot be liable for that negligence when it causes injury to a firefighter who comes to extinguish the blaze. ***Id.*** *@ 327, 179 N.W.2d 885, 888.*

B. Modifications to, and interpretations of, the Firefighter's Rule

Clark v. Corby, *75 Wis.2d 292, 249 N.W.2d 567 (1977),* addressed the Firefighter's Rule in terms of whether a landowner owes any duty to a firefighter who is injured while fighting a fire, where the injury is due to "special hazards." The plaintiff in **Clark**, was a firefighter who sued under three different theories of liability: 1) common negligence for starting the fire; 2) negligence in failing to warn of known hidden-hazzards, and; 3) negligence for violating housing codes. The Court dismissed the common negligence claim under ***Hass***, but allowed the other claims to proceed to trial. In so doing, the Court held that:

- The Rule was not a bar to a claim of failure-to-warn, ***Id.*** *@ 298, 294 N.W.2d 567, 570;*
- A homeowner has a duty to warn a firefighter of hidden hazzards known to the homeowner but not the firefighter, where homeowner had the opportunity to warn, ***Id.***, and;
- The Rule was not a bar to a negligence claim based upon a municipal code violation, if the plaintiff could prove at trial that he was within the scope of protection of the ordinances allegedly violated. ***Id.*** *@ 300, 294 N.W.2d 567, 571-572.*

Wright v. Coleman, *148 Wis.2d 897,436 N.W.2d 884 (1989),*

addressed the Rule in terms of whether a defendant had a duty to warn of known hazards, as opposed to the "hidden" hazards previously addressed in ***Clark***.

In ***Wright***, a firefighter was injured when he slipped on ice at a fire scene. The Court found the homeowner had a duty to warn of known hazzards and that the homeowner would be negligent for failure to warn if, under the circumstances, it would have been reasonable to do so. ***Id.*** *@ 907, 436 N.W.2d 864,868.* As a result of both ***Clark*** and ***Wright***, the Firefighter's Rule is, therefore, not a bar to a claim based upon failure to warn.

Hauboldt v. Union Carbide, *160 Wis.2d 662, 467 N.W.2d 508 (1991)*, addressed the Firefighter's Rule in terms of whether a firefighter could proceed against a 3rd party for injuries sustained in the course of a fire. There, a firefighter was injured by the unexpected explosion of a defective acetylene tank and not by the fire or structural damage incidentally resulting from the explosion.

Hauboldt stands for the proposition that, if a firefighter didn't have an opportunity to prepare for the danger which caused his injury, and the danger was not apparent or anticipated, a cause of action based upon injuries resulting from an intervening event can proceed. ***Id.*** *@ 667, 467 N.W.2d 508, 509.*

However, ***Hauboldt*** is also significant in that it clarified the general holding in ***Hass***, stating that the Firefighter's Rule was "nothing more than a *limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread.*" ***Hauboldt*** *@ 673, 467 N.W.2d 508, 512. (emphasis added).*

C. *Pinter v. American Family Insurance Co., 2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110 (2000),* and the purpose behind expanding the Firefighter's Rule to Emergency Medical Technicians ("EMT")

Pinter is our Supreme Court's most recent pronouncement on the Firefighter's Rule. ***Pinter*** recognized that ***Hass*** barred a cause of action *only when the sole negligent act was the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency*. ***Pinter***, *2000 WI 75 @ ¶ 31, 236 Wis.2d 137, 613 N.W.2d 110.* However, ***Pinter*** extended the Firefighter's Rule beyond its historical context of applying only to firefighters, finding it appropriate to apply the rule to an EMT who was *dispatched* to the scene of a motor vehicle accident and was injured while attempting to rescue a motorist.

I. *Pinter's* requirement of specialized training and experience in rescue operations

Pinter's expansion of the Firefighter's Rule to encompass EMT's was due -- in its entirety -- to the extraordinary similar professions of firefighter and EMT; both were specifically trained for, and had as their sole or major function, life saving and rescuing. ***Id.*** *@ ¶43-44, 236 Wis.2d 137, 613 N.W.2d 110.* The Court stated:

> . . . *Firefighting and emergency medical assistance are closely related professions*; like Pinter, some EMT's also serve as firefighters. Members of both professions have special training and experience that prepare them to provide assistance under dangerous and emergency conditions. Persons entering either profession know that they will be expected to provide aid and protection to others in these hazardous circumstances. *In short, both firefighters and EMT's are professional rescuers who are specifically trained and employed to conduct rescue operations in dangerous emergencies*. ***Id.*** *@ ¶43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added).*

> *The facts of Pinter's case illustrate this point. Pinter had helped to extricate injured individuals from automobiles on over two hundred occasions*. Pinter's injury occurred because he was required to maintain an awkward position for an extended period of time to avoid aggravating the passenger's spinal injuries. *Thus, because of his position as a specially trained, experienced EMT, Pinter was*

asked to put himself in harm's way for the protection of another, more seriously endangered individual. ***Id.*** *@ ¶44, 236 Wis.2d 137, 613 N.W.2d 110.(emphasis added).*

II. *Mullen v. Cedar River Lumbar Co., 246 Wis.2d 524, 630 N.W.2d 574 (Ct.App. 2001),* recognized the significance of *Pinter's* reliance on specialized training and experience in rescue operations in order to expand application of the Firefighter's Rule

Following ***Pinter***, the Court of Appeals addressed the application of the Firefighter's Rule in ***Mullen v. Cedar River Lumbar Co.***, *246 Wis.2d 524, 630 N.W.2d 574 (Ct.App. 2001).* The issue in that case was whether a superintendent of public works who was injured when responding to an oil spill could maintain a cause of action against the company whose truck had dumped the oil. There, the defendants sought to apply the Firefighter's Rule under ***Hass*** and ***Pinter***, arguing that the plaintiff, as superintendent of public works, had special knowledge & experience in oil spills and was called to the scene specifically because of his knowledge and experience.

However, ***Mullen*** distinguished ***Hass*** and ***Pinter*** by finding that firefighters and EMTs, as opposed to a superintendent of public works, were professional rescuers who were specifically trained and employed to conduct rescue operations in dangerous emergencies. The Court stated:

> Although the superintendent had experience and some training in responding to fuel oil spills, it is undisputed that responding to spills constitutes only a small part of Mullen's job. He is also responsible for garbage removal, the recycling program, road maintenance and snow removal. ***Id.*** *@ ¶15, 630 N.W.2d 574 (Ct.App. 2001).*

> Given Mullen's limited duties at the time of a fuel spill and the infrequency of spills to which he responds, we are unpersuaded that Mullen's role is sufficiently similar to the role of firefighters and EMT's to justify extending the firefighter's rule to include Mullen. Unlike firefighters and EMT's, Mullen is not a professional rescuer who is "specially trained and employed to conduct rescue operations." ***Id.*** *@ ¶16, 630 N.W.2d 574 (Ct.App. 2001), citing* ***Pinter*** *2000 WI 75 @ ¶ 43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added).*

III. The record is void of any facts supporting the Trial Court's finding that the training received by MPD officers, or Officer Cole's own on-the-job experience, required expanding the Firefighter's Rule to police officers under *Pinter*

While ***Pinter*** and ***Mullen*** recognized that the professions of firefighter and EMT were extraordinarily similar because of their joint status as "trained professional rescuers," the same cannot be said of police officers in the City of Milwaukee.

The record demonstrates that the main function of a

police officer is the detection and prevention of crime, as well as the apprehension of criminals. ***R.17(@2)***. While police may, in the course of their employment, *occasionally* enter into the "rescuer" mode, those situations are few and far between and certainly neither an officer's primary function, nor one for which an officer is specifically trained. ***R. 17(@2)***.

The record is completely void of any facts supporting the Trial Court's finding that police officers, like firefighters and EMTs, are ". . .professional rescuers specially trained and employed to conduct rescue operations in dangerous emergencies," ***See R.19(@5)***, or that "the job of a police officer is arguably even more similar to [that of] a firefighter than an EMT." ***Id.***

a. The training received by MPD officers is insufficient to warrant expanding the Firefighter's Rule to Officer Cole under *Pinter*

As indicated previously, a police officer's training, whether it be in the Police Safety Academy at the beginning of their career or thereafter, focuses on the prevention and detection of crime and the apprehension of criminals. ***R.16(@4) & R.17(@2)***. While police officers may occasionally enter into the "rescuer" mode, those situations are few and far between,

and certainly neither their primary function, nor one for which they're trained. ***R.17(@2).***

Moreover, the MPD doesn't provide any training on how to capture or handle stray dogs. ***R.16(@4).*** Although some MPD squad cars are equipped with a "noose" capable of snaring a stray animal, the squad to which Officer Cole was assigned when she was attacked by the Hubanks' dog wasn't equipped with such a device. ***R.16(@4&7).*** Even if her squad car had been so equipped, Officer Cole has never used it herself nor ever seen anyone use it. ***R.16(@6).*** In fact, the MPD doesn't even provide any training on how to use the device, ***R.16(@6) & R. 17(@3),*** and Officer Cole had absolutely no professional training which would have prepared her for what she encountered. ***R.16(@4) & R.17(@3).***

Nevertheless, the Trial Court found that "a police officer is specifically trained and required to provide aid and protection to others in hazardous circumstances and should anticipate dangerous situations." ***R.19(@4).*** The record contains nothing to support such an assertion.

In addition, the Trial Court's assertion -- again, unsupported by the record -- that police officers provide "aid and protection to others in hazardous circumstances," ***R. 19(@4),*** is not only irrelevant to whether police officers should be placed in the same classification as firefighters

and EMTs (i.e., trained professional rescuers), it's also incorrect. This case doesn't deal with a police officer providing "aid and protection to others." It involves a police officer who was mauled by a stray dog, after the officer saw the dog walking in the street trailing a chain. Moreover, police officers are specifically trained to request assistance from the Milwaukee Fire Department ("MFD") and EMTs when dealing with sick and injured persons in need of rescue. ***R. 17(@2).***

Finally, the Trial Courts' reference to police officers being expected to "anticipate dangerous situations," ***R.19(@4),*** has no place in this analysis. Assumption of risk was never the basis behind the Firefighter's Rule in Wisconsin. As was specifically noted in ***Pinter***:

> . . . Jurisdictions that relied on the assumption of risk doctrine to justify the "firefighter's rule" have abandoned the rule under comparative negligence principles . . . However, ***Hass*** *was never premised on the idea that a firefighter's assumption of the risks inherent in his or her profession makes the firefighter's negligence greater than the alleged tortfeasor's as a matter of law."* ***Pinter*** *@ ¶36, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added).*

As a result, the Trial Court's assertion that Officer Cole "should have realized that the dog was possibly dangerous and anticipate this risk," ***R.19(@4),*** is misplaced.

b. Officer Cole's on-the-job experience dealing with stray dogs is insufficient to warrant expanding the Firefighter's Rule under *Pinter*

The record establishes that: 1) Officer Cole had absolutely no experience catching stray dogs during her 12 week "Field Training" after graduating from the Police Safety Academy, ***R.16(@5)***; 2) prior to her being bitten, Officer Cole had caught a stray dog on only 3-4 occasions over her 6 year career as an officer, ***R.16(@5&11) & R.17(@2)***, and; 3) Officer Cole's lack of experience dealing with stray dogs is typical. ***R.17(@2)***.

If ***Pinter*** stands for anything, it is the proposition that "professional rescuers who are specifically trained and employed to conduct rescue operations" (i.e., firefighters and/or EMTs) are prohibited from maintaining a claim of negligence based *solely* on the same negligence that caused the initial emergency and resulted in the rescue personnel being called to the scene. ***Pinter*** *@ ¶44-50, 236 Wis.2d 137, 613 N.W.2d 110.*

Given the facts contained in the record, not only does ***Pinter*** not require application of the Firefighter's Rule to police officers in general, it doesn't even suggest application to Officer Cole. First, Officer Cole was not "called to" the scene -- a fact consistently found in each and

every case addressing the Firefighter's Rule since its inception in ***Hass*** -- but took police action when she saw the Hubanks' stray dog running loose. ***R.16(@9)***.

Second, catching a stray dog cannot be construed as a "rescue operation." Rescue operations have consistently been found while saving real property and lives (e.g., firefighters and EMTs), but not capturing a stray dog.

However, even if one assumes that capturing a stray dog could be construed as a rescue operation, the record clearly establishes facts sufficient to remove police officers from the scope of the Firefighter's Rule according to ***Mullen***, including: 1) the MPD's lack of training on how to capture stray dogs, ***R.16(@4)***; 2) Officer Cole's insignificant experience in performing such activities (i.e., having caught only 3-4 dogs over the course of her 6 years tenure with the MPD), ***R.17(@2)***, and; 3) the fact that capturing stray dogs constitutes such a minuscule portion of a police officer's activities. ***Id.***

Third, Officer Cole's claims were not based *solely* on the same negligence that caused the initial emergency; the standard for application of the Firefighter's Rule in every case since ***Hass***, including ***Pinter***.

Nonetheless, the Trial Court asserted that, "even if only a small part of her job, Officer Cole's capture and handling

of Defendants' dog was nevertheless clearly a function of her job of ensuring the safety of the community . . . [and that, as a result] the firefighter's rule is properly extended to Officer Cole." ***R.19(@5)***. The Trial Court appears not to have recognized the subtle distinctions contained in the relevant precedent.

2. PUBLIC POLICY IS NOT FURTHERED BY EXPANDING THE FIREFIGHTER'S RULE TO ENCOMPASS POLICE OFFICERS

A. The Firefighter's Rule is a limited exception to the general rule of liability for negligence

The Firefighter's Rule has historically been "nothing more than a *limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread.*" ***Hauboldt*** *@ 673, 467 N.W.2d 508, 512, citing to* ***Wright*** *@ 902, 436 N.W.2d 864, 866. (emphasis added).*

In fact, other than ***Pinter***, there is absolutely no Wisconsin precedent applying the Firefighter's Rule to any profession other than firefighters. In ***Pinter***, the Firefighter's Rule was expanded to EMT's based solely on the remarkable similarity between the two professions in terms of training, experience and purpose/function. ***Id.***, *@ ¶43-44, 236 Wis.2d 137, 613 N.W.2d 110.*

B. Expanding the Firefighter's Rule to police officers would allow the "limited exception" to swallow the general rule

Expanding the Firefighter's Rule to police officers would serve only to allow the "limited exception" to swallow the general rule. If the Firefighter's Rule were allowed to be expanded, it would reasonably be a complete defense to such heretofore uncontemplated situations, as:

- Barring a Milwaukee Public School school safety official (i.e., security guard) from suing based upon injuries sustained due to the negligence of students;
- Barring teachers who assist children under dangerous emergency conditions from suing the child or his/her parents for injuries sustained due to the child's negligence;
- Barring a building inspector from suing a landowner for negligently failing to properly maintain or warn a building, when the inspector is injured after falling through a rotten floor while inspecting the building;
- Barring emergency room doctors and nurses or ambulance personnel from suing patients when they are injured as a result of the patient's negligence, and;
- Barring a safety inspector from suing the Milwaukee Metropolitan Sewerage District ("MMSD") for injuries received while inspecting the "Big Tunnel," as a result of the MMSD's negligence in maintaining the Tunnel.

As these examples demonstrate, expanding the Firefighter's Rule to police officers would "enter a field that has no sensible or just stopping point." ***Hass*** *@ 327, 179 N.W.2d 885, 888, citing* ***Colla v. Mandella****, 1 Wis.2d 594, 598, 85 N.W.2d 345, 348 (1957).* Certainly, public policy does not favor such a result.

C. Expanding the Firefighter's Rule to police officers would be inconsistent with public policy stated in *Hass* and reiterated in *Pinter*

Expanding the Firefighter's Rule would also be inconsistent with the public policy stated in ***Hass*** and reiterated in ***Pinter*** (i.e., to bar a cause of action only when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency). ***Hass*** *@ 327, 179 N.W.2d 885, 888; also,* ***Pinter****, 2000 WI 75 @ ¶31, 236 Wis.2d 137, 613 N.W.2d 110.*

It is only in the unusual or very clear case that a court can conclude, as was done in ***Haas*** and ***Pinter***, that despite negligent conduct, there shall be no recovery as a matter of law (i.e., appropriate public policy). ***Wright*** *@ 908, 436 N.W.2d 864, 868.* Officer Cole's having been injured by the Hubanks' dog is not such a case.

An example of where public policy *would* arguably allow

for expansion of the Firefighter's Rule, would be where a lifeguard is injured by the negligence of a drowning swimmer whom the lifeguard is in the process of attempting to save; the lifeguard is specifically trained for rescue operations (i.e., saving the life of drowning swimmers) and is "asked to put himself in harm's way for the protection of another, more seriously endangered individual," ***Pinter***, *2000 WI 75 @ ¶44*, 236 Wis.2d 137, 613 N.W.2d 110, and becomes injured in the process.

While police officers are required to place themselves in harms way for the protection of another *when preventing and detecting crime, as well as apprehending criminals*, they are not trained professional rescuers. ***R.17(@2)***. As such, the public policy which led ***Pinter*** to expand the Firefighter's Rule to encompass EMT's does not exist in the present case. This Court should therefore be guided by the reasoning in ***Mullen***, and refuse to apply the Firefighter's Rule to police officers.

3. EVEN IF THIS COURT EXPANDS THE FIREFIGHTER'S RULE TO POLICE OFFICERS, IT DOES NOT BAR OFFICER COLE'S CLAIMS, AS THEY ARE NOT BASED "SOLELY" ON THE DEFENDANTS' "INITIAL ACTS OF ALLEGED NEGLIGENCE"

As a result of the manner in which Officer Cole plead her Amended Complaint, none of the Wisconsin cases addressing the

Firefighter's Rule (i.e., ***Hass***, ***Clark***, ***Wright***, ***Hauboldt***, ***Pinter*** or ***Mullen***) bar Officer Cole's causes of action.

Officer Cole's Amended Complaint alleges negligence by the Hubanks under the following theories:

- The manner in which they cared for the Akita which attacked and injured Officer Cole, allowing it to run at large, ***R.5(@5)*** *@ ¶ 8;*

- The manner in which they restrained the Akita which attacked and injured Officer Cole, by failing to properly secure the Akita (i.e., properly fencing the Akita), ***R.5(@5)*** *@ ¶ 9;*

- Violations of Chapter 78 of the Milwaukee Code of Ordinances, in that the Hubanks continued to harbor what they knew to be a dangerous animal, as that term is defined therein, ***R.5(@5)*** *@ ¶ 10;*

- Violations of Chapter 78 of the Milwaukee Code of Ordinances, in that the Hubanks failed to properly muzzle the Akita, given its known dangerous propensities, ***Id.;***

- Failure to warn the public as to the known dangerous nature of their Akita, by muzzling the dog or otherwise, where it had on information and belief, on at least one prior occasion, attacked without provocation or warning and injured another citizen, all in violation of Chapter 78 of the Milwaukee Code of Ordinances, ***Id.;***

- Strict liability for violations of Chapter 78 of the Milwaukee Code of Ordinances which resulted in the injury to Officer Cole, ***R.5(@5-6)*** *@ ¶ 12, and;*

- Strict liability for violations of §174.02, Wis. Stats., which resulted in the injury to Officer Cole. ***Id.*** *@ ¶ 13.*

When Officer Cole happened upon the Hubanks' dog, it was crossing a street dragging a chain. ***R.16(@10,12-14).*** As such, the "initial act of alleged negligence" would have been the Hubanks' failure to properly secure their dog (i.e., failing to provide a sufficiently strong chain to restrain their dog's movement and/or failing to adequately fence the dog in the event it wasn't chained up in the first place). As Officer Cole's claims are not based "solely" on that "initial act of alleged negligence," they should survive defendants'-respondents' motion for summary judgment, even if the Firefighter's Rule is found applicable to police officers.

A. All of Officer Cole's causes of action based upon a violation of a Milwaukee Ordinance survive

All causes of action based upon a violation of the Milwaukee Code of Ordinances survive, as long as Officer Cole can demonstrate that she, as a police officer, was within the scope of those whom the ordinance was meant to protect. ***Clark*** *@ 299-300.*

However, the Trial Court found that, "[p]ursuant to ***Clark***, here any violation of ordinance by the Plaintiffs'

(sic) failure to restrain their dog and by the dog's biting of the officer, is not a violation of a statute *specifically enacted to protect* police officers from injury." ***R.19(@3)*** *(emphasis added)*. Unfortunately, the Trial Court misconstrued the legal standard set forth in ***Clark***.

Clark did not require a plaintiff to demonstrate that the ordinance was "specifically enacted" to protect a firefighter. Rather, ***Clark*** merely held that a claim of a municipal violation causally related to a plaintiff's injury would survive a motion for summary judgment as long as "it can be shown *at trial* that the [plaintiff] is within the scope of protection of the ordinances allegedly violated . . . ." **Clark** @ 302. *(emphasis added)*.

An example of where an ordinance would not be meant to protect a plaintiff in the context of the Firefighter's Rule, would be where a firefighter is burned while responding to a fire and sues the homeowner under the theory that the homeowner failed to comply with an ordinance regulating the removal of lead-based paint. It's reasonable to presume that the intent behind a lead-based paint ordinance would be to protect people, and especially children, who may come in contact with lead because of its toxicity. However, because that purpose has nothing to do with protecting people from being burned, it would not serve to insulate such a claim from

the scope of the Firefighter's Rule.

It's helpful to examine the ordinance at issue in ***Clark***, and the allegations of negligence pertaining thereto which the Supreme Court remanded for further proceedings. The ordinance in ***Clark*** dealt with a code regulating basement exits. The plaintiff alleged that, in violation of the ordinance, the defendant had built his basement without an outside opening, and that such failure was a substantial factor in the plaintiff's having been trapped in the basement, resulting in injuries. ***Clark*** recognized that, at the stage of demurrer, resolution of the question as to whether the firefighter/plaintiff was within the scope of people the ordinance was meant to protect was premature.

Like the ordinance in ***Clark***, the municipal ordinance violations alleged in Officer Cole's Amended Complaint are meant to protect the safety of the public. The only difference is that, in ***Clark***, the ordinance appeared to protect people from dangerous confinement in a basement, whereas in Officer Cole's case the ordinance appears to have meant to protect the public from dangerous animals. ***R.16(@19-25)***. Officer Cole remains a member of the public, regardless of the facts that she was wearing her uniform at the time of her injury.

As a result, all of Officer Cole's causes of action

specifically referencing a municipal violation survive under ***Clark***. Furthermore, the two causes of action not couched in terms of a municipal violation contained in ¶8 & ¶9 of the Amended Complaint(i.e., negligence in the manner in which defendants cared for and restrained the dog by allowing it to run at large, and not be properly secured), ***R.5(@5)***, also survive because the municipal ordinances contained in the record regulate the confinement of dangerous animals. ***R. 16(@19-31)***.

B. All of Officer Cole's causes of action based upon a failure to warn survive

There is simply no authority to suggest that the Firefighter's Rule bars a cause of action based upon failure to warn. In fact, claims based upon failure to warn have been specifically *excluded* from applicability of the Firefighter's Rule. ***Clark*** *@ 299-300, 249 N.W.2d 567, 571; also,* ***Wright*** *@ 907, 436 N.W.2d 864, 868.*

Hidden hazzards (i.e., the propensity of the Hubanks' dog to attack without provocation) aren't subject to the Firefighter's Rule where the owner had the opportunity to warn. ***Clark*** *@ 299-300, 249 N.W.2d 567, 571.* As alleged in Officer Cole's Amended Complaint, the Hubanks had the opportunity to warn and could have warned by simple compliance

with the ordinance requiring use of a muzzle. ***See R.5(@3).***

Similarly, known hazzards - again, the propensity of the Hubanks' dog to attack without provocation - are also excluded from the Firefighter's Rule where, under the circumstances, it would have been reasonable to warn. ***Wright*** *@ 907, 436 N.W.2d 864, 868.* It's completely reasonable to presume that, if an individual came in contact with a muzzled dog, that individual would presume the dog to be dangerous, and have been warned of the dog's propensity to attack. As Chapter 78 of the Milwaukee Code of Ordinances specifically requires confinement and the use of a muzzle, ***R.16(@25)***, the "reasonableness" of having to warn must be presumed as a matter of law.

As a result, all of Officer Cole's causes of action alleging a failure to warn survive under ***Clark*** and ***Wright.***

CONCLUSION

For all the above-stated reasons, Officer Cole respectfully requests that this Court reverse the Trial Court's grant of summary judgment in favor of Defendants-Respondents on the basis that, because public policy is not furthered by expanding the Firefighter's Rule to include police officers, defendants are not entitled to judgment as a matter of law.

In the alternative, if this Court finds that expanding the Firefighter's Rule to police officers is appropriate, then Officer Cole would respectfully request this Court reverse the Trial Court's decision, as all of Officer Cole's claims fit within recognized exceptions to the Firefighter's Rule under ***Clark*** and ***Wright*** (i.e., they address allegations of: 1) failure to warn where it was both reasonable to warn and defendants had an opportunity to do so, and; 2) municipal violations which are meant to protect persons such as Officer Cole).

Dated this 20th day of August, 2002.

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)and(c), Stats., for a brief and appendix produced with a monospaced font. The length of this brief is 31 pages.

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INDEX TO APPENDIX

COPY

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

and

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

RECEIVED
APR 16 2002
EGGERT & CERMELE, S.C.

Case No. 01CV007770

FILED
22 APR 12 2002 22
JOHN BARRETT
Clerk of Circuit Court

DECISION AND ORDER

INTRODUCTION

This case arises out of a police officer's claim for injuries received while attempting to retrieve a stray dog. Plaintiff Officer Julia Cole came upon a dog running loose while she was on patrol on January 8, 2001. The dog was running in the street dragging a leash behind it. Officer Cole stopped and tried to retrieve the dog by grabbing the leash and coaxing the dog forward. As Officer Cole attempted to persuade the dog, the dog unexpectedly lunged at her, biting her in the face and neck. Plaintiff filed a lawsuit in an attempt to recover damages for injuries sustained in the attack. The suit accuses the owners of the dog of negligently caring for and restraining the dog, harboring a dangerous animal, failing to confine and muzzle the dog, and failing to warn the public of the known dangerous nature of the dog. Defendants filed a Motion for Summary Judgment on March 4, 2002 requesting that Plaintiff's claim be dismissed pursuant to the "firefighter's rule." Plaintiff filed a Brief in Opposition to Defendant's Motion for Summary Judgment on March 19, 2002.

ANALYSIS

Wisconsin Statute §802.08(2) provides that a party is entitled to summary judgment:

[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead to only one conclusion. Beyak v. North Central Food Systems, Inc., 215 Wis.2d 64 (Ct. App. 1997). A "material fact" is one that is of consequence to the merits of the litigation. Sherry v. Salvo, 205 Wis.2d 14 (Ct. App. 1996). A factual issue is "genuine" if the evidence is such that a reasonable juror could return a verdict for the nonmoving party. Kenefick v. Hitchcock, 187 Wis.2d 218 (Ct. App. 1994). Summary judgment must be granted where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Jackson v. Benson, 218 Wis. 835 (1998).

The "firefighter's rule" was first used in Wisconsin in Hass v. Chicago & North Western Railway which recognized a limitation on liability in a firefighter's negligence action. 48 Wis.2d 321, 179 N.W.2d 885 (1970). That case held that "one who negligently starts a fire is not liable for that negligence when it causes injury to a firefighter who comes to extinguish the blaze." Id. at 327. The Hass rule was modified slightly in 1977 in Clark v. Corby. 75 Wis.2d 292, 249 N.W.2d 567 (1977). Though affirming the basic public policy of Hass, Clark determined that a firefighter could pursue a cause of action based on additional acts of negligence other than the initial negligence that caused the fire. Id. In that case, the Court allowed causes of action based on failure to warn about hidden special dangers and violation of the housing code to proceed. Id. The action based on violation of the housing ordinance was allowed to proceed only if the plaintiff could establish that the ordinance was specifically enacted to protect the firefighter. Id.

Wright v. Coleman next examined the firefighter's rule and clarified that Hass only precludes a negligence action when it is based on the initial act of negligence that caused the fire and necessitated the rescue. 148 Wis.2d 897, 904, 436 N.W.2d 864 (1989). In that case, the firefighter was injured when he slipped and fell on the defendant's icy driveway. Id. The court determined that liability might exist if under the circumstances, a reasonable person would have warned the firefighter about the ice. Id. In the next case to consider the "firefighter's rule," Hauboldt v. Union Carbide Corp. applied Hass and found that the public policy considerations barring recovery in that case do not bar a cause of action that is based on an independent act of negligence. 160 Wis.2d 662, 467 N.W.2d 508 (1991). In Hauboldt, a firefighter's claim against a manufacturer whose defective product directly caused injury to the firefighter during the course of a fire, when the defective product was not reasonably apparent or the risk anticipated, was not barred. Id. The "firefighter's rule" was extended most recently in Pinter v. American Family Mutual Insurance Company to bar recovery in a case in which an emergency medical technician (EMT) sustained injuries while performing his duties. 236 Wis.2d 137, 613 N.W.2d 110 (2000). The court first reaffirmed the public policy considerations in Hass and then went on to liken emergency medical technicians to firefighters, noting that both are members of professions in which they receive special training and

experience to prepare them to provide assistance under dangerous emergency situations. Id. In Pinter, the court addressed an argument that because the negligent driver violated the motor vehicle code, a separate basis of recovery had been established. Id. The court rejected that argument citing Clark for the proposition that the protection of an ordinance is extended only to those whom the enactment was intended to protect, finding that the motor vehicle code is not designed to protect rescuers in the performance of their duties. Id. Interestingly, the court concluded that had the plaintiff sought recovery on the basis of some act other than the initial negligence that necessitated emergency medical assistance, plaintiff's claim would not have been barred. Id.

Defendant contends that Plaintiff cannot maintain a cause of action against the Defendants based on the firefighter's rule. Defendants argue that the negligence complained of in her complaint is the cause of Plaintiff's injuries and her claim is therefore barred. Defendants state that Plaintiff's occupation specially prepares her to provide protection to others in hazardous situations and that she therefore falls in the same category as firefighters.

Plaintiff argues that this case is distinguishable from those cases under the firefighter's rule. Plaintiff points to the fact that here the officer had not been called and was not "responding" to the scene of the stray dog, like the firefighters and EMT in the firefighter's rule cases. In addition, Plaintiff argues that the Defendants violated statutes requiring them to restrain their dog, and that therefore, there is an act of intervening negligence and the firefighter's rule cannot bar recovery. In addition, Plaintiff asserts that Officer Cole's main function was not to capture stray dogs, and she was not trained or prepared to handle dogs. Finally, Plaintiff argues that Defendants had a duty to warn the public of the dangerous propensity of the dog and failed in that duty by failing to warn by placing a muzzle on the dog or otherwise.

Pursuant to Clark, here any violation of ordinance by the Plaintiffs' failure to restrain their dog and by the dog's biting of the officer, is not violation of a statute specifically enacted to protect police officers from injury. Such a statute is arguably enacted to protect the public in general (and to punish dog owners) but in her capacity as a police officer, Plaintiff undertakes such jobs as encountering stray animals that are potentially dangerous. See also Pinter at 157 (finding that negligence through violation of motor vehicle statutes did not state a claim as the statute was not designed to protect EMT's from injury); Clark at 299-300 (finding that a firefighter's claim based on a housing code violation could proceed provided that the plaintiff was able to establish that the ordinance was enacted to protect a firefighter in the performance of his or her duties). In Pinter, the court found that violation of the motor vehicle code was not meant to protect EMT's, although motor vehicle statutes are arguably meant to protect the public's safety and an EMT is certainly a member of the public. Here, although the ordinance requiring restraint of dogs is similarly meant to protect the public and police officers are members of the public, Plaintiff's action does not survive for the same reasons that Pinter's action did not. The ordinance requiring restraint of dogs was not designed to protect police officers in the performance of their duties just as the motor vehicle code was not designed to protect EMT's in the performance of their duties. Accordingly, the

Court does not accept Plaintiff's argument that her action survives due to this ordinance violation.

Under Wright, which held that a negligence action is precluded only when it is based on the initial act of negligence that caused the fire and necessitated the rescue, Plaintiff's action is similarly precluded. The Court is not persuaded by Plaintiff's attempt to distinguish this case because the officer was not actually responding to an emergency call, but was attempting to subdue a dog on her own initiative. Here, Officer Cole was "responding" to the very negligence that caused her injury. The fact that the dog had not been restrained and was running loose, is one of the bases of negligence that Plaintiff relies upon in her complaint. Plaintiff's actions therefore resulted from the initial acts of negligence that caused the dog to be roaming free and necessitated the rescue/restraint of the dog.

Further, pursuant to Hauboldt, although not a case of a defective product, the Plaintiff cannot claim that the fact that the dog was dangerous was not reasonably apparent or the risk anticipated. Plaintiff argues that her causes of action based on failure to warn survive because Defendants had the opportunity and failed to warn (by muzzling the dog) of the hidden hazard of their dog's propensity to attack without provocation. To the contrary, the Court finds that even if the dog had been muzzled and even accepting Plaintiff's description of it's "calm" appearance, Plaintiff, especially in her capacity as a police officer trained to deal with dangerous situations, should have realized that the dog was possibly dangerous and anticipated this risk. Officer Cole chose to catch the Defendants' dog as part of her duties. Plaintiff should have been aware of the possibility that any dog could be dangerous despite its outward appearance or lack of muzzle.

Finally, applying Pinter to this case and despite Plaintiff's contention that she does not have sufficient training that would have prepared her to capture or handle a stray dog (as the main function of a police officer is detection and prevention of crime and not "rescue") the Court finds that the job of a police officer is similar to both a firefighter and an emergency medical technician. As is true with a firefighter and EMT, a police officer is specially trained and required to provide aid and protection to others in hazardous circumstances and should anticipate dangerous situations. See Pinter at 157 (concluding that "EMT's, like firefighters, are specially employed and trained to confront danger"); Neighbarger v. Irwin Industries, Inc., 8 Cal. 4th 532, 882 P.2d 347 (1994)(finding that the public hires, trains and compensates public firefighters and police officers to confront danger and that the basic public policy rationale underlying the firefighters's rule is the spreading to the public of the costs of employing safety officers and compensating them for any injuries they may sustain in the course of their employment). In Neighbarger, the court distinguished private versus public employees in refusing to extend the rule to a private safety employee but discussed at length the development of the public policy rationale necessitating the firefighter's rule, concluding that the public by employing firefighters [and police officers] and taxing itself for their services, has in effect, "purchased exoneration from [a] duty of care and should not have to pay twice, through taxation and through individual liability, for that service." Id. at 543. See also Hubbard v. Boelt, 28 Cal.3d 480, 620 P.2d 156 (1980)(finding that one who has voluntarily

confronted a known risk cannot recover for injuries based on public policy that precludes tort recovery by fireman or policemen who are presumably adequately compensated in special salary, retirement, and disability benefits for undertaking hazardous work).

In addition, Plaintiff even concedes that by statute she is required to retrieve stray dogs. Here, Officer Cole had attempted to and did rescue/retrieve other dogs previously in her career, and cannot now complain of the very negligence that necessitates her job. See Neighbarger at 540(noting that the firefighter cannot complain of negligence in the creation of the very occasion for his engagement). Plaintiff's argument that Pinter only applies to firefighters and to an initial act of negligence that caused a fire and rescue and that here Plaintiff is not a firefighter and this case does not involve fire or rescue, is therefore unconvincing.

The fact that the court failed to expand the rule to a superintendent of public works in Mullen does not change the result in this case. See Mullen v. Cedar River Lumbar Co., 246 Wis.2d 524, 630 N.W.2d 574 (Ct. App. 2001)(refusing to expand Hass/Pinter to a superintendent of public works, stating that EMT's and firefighters were distinguishable in that they are professional rescuers specially trained and employed to conduct rescue operations in dangerous emergencies). Plaintiff asserts that Mullen did not extend the firefighter's rule because the plaintiff's response to the scene in that case was only a small part of plaintiff's job and that here, Plaintiff's response to a stray dog was also a miniscule part of her job. Clearly, the court has recently expanded the rule to include EMT's, and the job of a police officer is arguably even more similar to a firefighter than an EMT. In addition, this case is clearly distinguishable from that of a public works superintendent. First, a superintendent of public works is not charged with a general duty to keep patrol and protect the community from various unknown hazards like the police officer. Second, even if only a small part of her job, Officer Cole's capture and handling of Defendants' dog was nevertheless clearly a function of her job of ensuring the safety of the community. Accordingly, the firefighter's rule is properly extended to Officer Cole.

The Court is aware that the firefighter's rule has yet to be expanded in Wisconsin to police officers. Such a case has apparently not arisen and has not yet been addressed by the Wisconsin Supreme Court. However, the court is hesitant to allow recovery under the facts of this case. Clearly police officers are injured by others' negligence in many if not all cases as that negligence necessitates their employment. Allowing police officers to sue for that very negligence is not in line with the public policy recognized by the firefighter's rule, which has been further extended to EMT's in Wisconsin. Accordingly and because the Court has found that the "firefighter's rule" is applicable to the facts of this case, Plaintiff is barred from recovery due to the dog owners' negligence. Therefore, Defendants are entitled to judgment as a matter of law and their motion for summary judgment will be granted accordingly.

CONCLUSION AND FINAL ORDER

Therefore, based upon a thorough review of the record and the arguments of the parties as set forth in their briefs, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment is granted.

2. Plaintiff's Complaint is dismissed.

Dated this 12 day of April, 2002.

BY THE COURT:

/S/ HON. WILLIAM J. HAESE

Judge William J. Haese
Milwaukee County Circuit Court, Branch 22

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

01CV007770

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

v.

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

ABC INSURANCE COMPANY,

Defendants.

HON. WILLIAM J. HAESE, BR. 22

CIVIL A

Case No.

FILED AND AUTHENTICATED
AUG 21 2001
JOHN BARRETT
Clerk of Circuit Court

JURY DEMAND FEE 12
PERSON $72.00 PAID

SUMMONS

THE STATE OF WISCONSIN

To each person named above as defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, 53233, and to Eggert & Cermele, S.C., plaintiff's attorneys

whose address is 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin, 53202. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 21st day of August, 2001 in Milwaukee, Wisconsin.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

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State Bar No.: 1020228

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STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

01CV007770

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749 West State Street
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and

ABC INSURANCE COMPANY,

Defendants.

Case No.

Case Code: 30107
(Personal Injury - Other)

FILED AND AUTHENTICATED
AUG 21 2001
JOHN BARRETT
Clerk of Circuit Court

COMPLAINT

The above-named plaintiff, by her attorneys, Jonathan Cermele and Eggert & Cermele, S.C., as and for claims against the above-named defendants, alleges and shows to the court as follows:

1. Plaintiff, Julia Cole, (Officer Cole), is an adult citizen of the State of Wisconsin, residing in the City and County of Milwaukee, whose working address is 749 West State Street, Milwaukee, Wisconsin, 53233, and is employed as a police officer with the City of Milwaukee Police Department (MPD).

2. Defendants, Aubrey Hubanks and Yvonne L. Hubanks (collectively "the Hubanks") are adult residents of the State of Wisconsin, are believed to be husband and wife and, whose last known address was 5280 North 65th Street, Milwaukee, Wisconsin.

3. Defendant, ABC Insurance Company, is as of yet an undetermined insurance carrier

JURY DEMAND FEE 12
PERSON $72.00 PAID

which, upon information and belief, was at all times pertinent hereto duly licensed to engage in the business of writing homeowner's and liability insurance policies in the State of Wisconsin and did have in full force and effect, a policy of liability insurance covering the Hubanks, for injuries such as those alleged in this Complaint.

4. On January 8, 2001, Officer Cole, while on duty and acting in her official capacity as a Police Officer with the MPD, attempted to subdue an Akita dog which had been running loose in the street at the approximate intersection of West Villard Avenue and North 55th Street in the City of Milwaukee. However, before Officer Cole was able to gain control of the Akita dog, it lunged at her, without provocation or warning, knocked her to the ground and repeatedly bit her in and about the face, neck and ear.

5. At all times pertinent hereto, the Hubanks did own the Akita dog which attacked Officer Cole.

6. At all times pertinent hereto, the Hubanks were negligent and careless in the manner in which they cared for the Akita dog which attacked Officer Cole, allowing it to run at large.

7. At all times pertinent hereto, the Hubanks were negligent and careless in knowingly continuing to harbor a dangerous animal which had, on information and belief, on at least one prior occasion, attacked, without provocation or warning, and injured another citizen.

8. As a direct and proximate result of the aforementioned negligent and careless acts and omissions of the Hubanks, Officer Cole suffered multiple serious and permanent injuries including, but not limited to: severe lacerations to her neck, face and ear; loss of flesh to her ear; and frequent and prolonged headaches. Additionally, Officer Cole has incurred, and will incur in the future, great pain, suffering and disability, medical expenses and lost wages, all to her damage in a sum to be determined at trial.

WHEREFORE, plaintiff demands judgment:

a. Against the defendants, awarding compensatory damages in an amount to be determined at trial;

b. Double damages, as provided under §174.02(1)(b), Wis. Stats.;

c. Penalties as required under §174.02(2), Wis. Stats.;

d. Awarding the plaintiff her reasonable costs and disbursements in this action; and

e. Such other relief the Court finds as just and reasonable.

Dated this 21st day of August, 2001.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
Suite 303
Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

Plaintiff hereby demands trial by a 12 person jury pursuant to §805.01(2) and §756.096(3)(b), STATS.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

-vs-

YVONNE L. HUBANKS, AUBREY HUBANKS, and ABC INSURANCE COMPANY,

Defendants.

Case No. 01-CV-007770
Code No. 30107

ANSWER TO PLAINTIFF'S COMPLAINT

NOW COME the defendants Yvonne L. Hubanks and Aubrey Hubanks, by their attorneys, PETERSON, JOHNSON & MURRAY, S.C., and in answer to the complaint of the plaintiff, admit, deny, allege and show to the court as follows:

1. In answer to paragraph 1, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

2. In answer to paragraph 2, admit the allegations contained therein.

3. In answer to paragraph 3, deny each and every allegation contained therein.

4. In answer to paragraph 4, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

5. In answer to paragraph 5, admit that they did own an Akita dog, but deny knowledge or information sufficient to form a belief as to whether such dog attacked officer Cole.

6. In answer to paragraph 6, deny any negligence or carelessness on the part of these answering defendants, deny that they allowed their dog to run at large, and deny knowledge or information sufficient to form a belief as to whether their dog attacked the plaintiff.

7. In answer to paragraph 7, deny any negligence or carelessness on the part of these answering defendants, deny that their dog was a dangerous animal, deny that they harbored a dangerous animal, and deny that the dog previously attacked anyone.

8. In answer to paragraph 8, deny any negligence or carelessness on the part of the defendants, or either of them, deny that any alleged negligence or carelessness on the part of either resulted in any injury or damage to the plaintiff, and deny knowledge or information sufficient to form a belief as to every other allegation contained therein.

9. As and for a first affirmative defense, allege that at and prior to the accident involved herein, the plaintiff was careless and negligent and that such carelessness and negligence was the sole and exclusive cause of any injuries or damages allegedly sustained by her.

10. As and for a second affirmative defense, allege that the complaint fails to state a claim upon which relief can be granted.

11. As and for a third affirmative defense, allege that the plaintiff may have received benefits pursuant to policies or plans of health, medical, disability or workers compensation insurance and that, to the extent of any benefits so received, such insurers or groups are subrogated, necessary parties hereto and the real parties in interest.

WHEREFORE, these answering defendants demand judgment dismissing the complaint, on the merits, with costs and disbursements and such other relief as may be just or equitable.

TRIAL BY A JURY OF 12 OF ALL ISSUES PROPERLY TRIABLE TO A JURY IS HEREBY DEMANDED.

Dated at Milwaukee, Wisconsin, this 10th day of September, 2001.

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants.
Yvonne L. Hubanks and Aubrey Hubanks

By: _____
James T. Murray, Jr.
State Bar No. 01016026

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† ALSO ADMITTED IN ILLINOIS

CLAYTON L. RIDDLE
PATRICIA J. EPSTEIN
DAVID F. ANDRES
MARIA DELPIZZO SANDERS*
SHERRY A. KNUTSON
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September 10, 2001

Writer's E-Mail Address:
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The Honorable William J. Haese, Branch 22
Milwaukee County Courthouse
901 N. Ninth St.
Milwaukee, WI 53233

RECEIVED
SEP 11 2001
EGGERT &

RE: Cole v. Hubanks, et al.
Case No.: 01-CV-007770
Date of Incident: January 8, 2001

Judge Haese:

I enclose the original Answer for filing on behalf of defendants Yvonne L. Hubanks and Aubrey Hubanks in the above-entitled matter. By copy of this letter, I am serving a copy on plaintiff's counsel, together with a copy of our first set of interrogatories. The original of the latter document is being retained in our file.

Thank you for your assistance.

Very truly yours,

PETERSON, JOHNSON & MURRAY, S.C.

James T. Murray, Jr.

JTM:dla
Enclosures
::ODMA\WORLDOX\F:\DOCS\02\770\00075704.WPD

cc: Jonathan Cermele, Esq. (w/ enclosures)

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

CITY OF MILWAUKEE
200 East Wells Street
Milwaukee, WI 53202,

Involuntary Plaintiff,

v. Case No. 01-CV-007770

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
6000 American Parkway
Madison, WI 53783,

Defendants.

FILED AND AUTHENTICATED
OCT 22 2001
JOHN BARRETT
Clerk of Circuit Court

SUMMONS FOR AMENDED COMPLAINT

THE STATE OF WISCONSIN

To each person named above as defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The amended complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the amended complaint. The

court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, 53233, and to Eggert & Cermele, S.C., plaintiff's attorneys whose address is 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin, 53202. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the amended complaint, and you may lose your right to object to anything that is or may be incorrect in the amended complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 22ND day of OCTOBER, 2001 in Milwaukee, Wisconsin.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
Suite 303
Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE
749 West State Street
Milwaukee, WI 53233,

Plaintiff,

CITY OF MILWAUKEE
200 East Wells Street
Milwaukee, WI 53202,

Involuntary Plaintiff,

v.

Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

YVONNE L. HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

AUBREY HUBANKS
5280 North 65th Street
Milwaukee, WI 53218,

and

AMERICAN FAMILY MUTUAL INSURANCE COMPANY
6000 American Parkway
Madison, WI 53783,

Defendants.

FILED AND AUTHENTICATED
OCT 22 2001
JOHN BARRETT
Clerk of Circuit Court

AMENDED COMPLAINT

The above-named plaintiff, by her attorneys, Jonathan Cermele and Eggert & Cermele, S.C., as and for claims against the above-named defendants, alleges and shows to the court as follows:

1. Plaintiff, Julia Cole ("Officer Cole"), is an adult citizen of the State of Wisconsin, residing in the City and County of Milwaukee, whose working address is 749 West State Street,

Milwaukee, Wisconsin, 53233, and is employed as a police officer with the City of Milwaukee Police Department ("MPD").

2. That Involuntary Plaintiff, City of Milwaukee ("City"), is a political subdivision organized and existing under the laws of the State of Wisconsin, with its principal place of business, main offices and mailing address located at 200 East Wells Street, Milwaukee, Wisconsin, 53202. Said Involuntary Plaintiff is self-insured and has paid medical and hospital expenses on behalf of Officer Cole, on account of injuries alleged herein and, as such, may claim a subrogated interest in this action under §102.29, Wis. Stats., and therefore is a proper party to this action pursuant to §803.03, Wis. Stats.

3. Defendants, Aubrey Hubanks and Yvonne L. Hubanks (collectively "the Hubanks"), are adult residents of the State of Wisconsin, are believed to be husband and wife and, whose last known address was 5280 North 65th Street, Milwaukee, Wisconsin, 53218.

4. Defendant, American Family Mutual Insurance Company, ("Am-Fam"), is a domestic company, existing under the laws of the State of Wisconsin, with its principal place of business located at 6000 American Parkway, Madison, Wisconsin, 53783. At all times material hereto, Am-Fam was duly licensed to engage in the business of writing homeowner's and liability insurance in the State of Wisconsin and did have in full force and effect a policy of homeowner's liability insurance, issued to the Hubanks and covering injuries such as those alleged in this complaint.

5. On January 8, 2001, Officer Cole, while on duty and acting in her official capacity as a Police Officer with the MPD, happened upon a loose Akita dog ("the Akita") roaming the street in the vicinity of the 5500 block of West Villard Avenue in the City and County of Milwaukee. Fearing that the Akita would be struck by a motor vehicle, seeing no apparent hazards or dangers immediately presented by the Akita, and complying with her professional obligations under §174.042, Wis. Stats., Officer Cole attempted to gain control of the Akita; however, before Officer Cole was able to do so, it lunged at her, without provocation or warning, knocked her to the ground

and repeatedly bit her in and about the face, neck and ear.

6. At all times pertinent hereto, the Hubanks did own the Akita which attacked and injured Officer Cole.

7. Upon information and belief, the Akita had, on at least one prior occasion, attacked and injured another citizen without provocation or warning.

8. At all times pertinent hereto, the Hubanks were negligent and careless in the manner in which they cared for the Akita which attacked and injured Officer Cole, allowing it to run at large.

9. At all times pertinent hereto, the Hubanks were negligent and careless in the manner in which they restrained the Akita which attacked and injured Officer Cole, by failing to properly secure the Akita.

10. At all times pertinent hereto, the Hubanks were negligent and careless in: knowingly continuing to harbor what they knew to be a dangerous animal, as that term is defined in Chapter 78 of the Milwaukee Code of Ordinances, in violation of said Ordinance; failing to properly confine and muzzle the Akita, given its known dangerous propensities, in violation of Chapter 78 of the Milwaukee Code of Ordinances, and; failing to warn the public as to the known dangerous nature of their Akita, by means of placement of a muzzle on the Akita or otherwise, where the Akita had, on information and belief, on at least one prior occasion, attacked, without provocation or warning, and injured another citizen, in violation of Chapter 78 of the Milwaukee Code of Ordinances.

11. As a direct and proximate result of the aforementioned negligent and careless acts and omissions of the Hubanks, Officer Cole suffered multiple serious and permanent injuries including, but not limited to: severe lacerations to her neck, face and ear; loss of flesh to her ear; and frequent and prolonged headaches. Additionally, Officer Cole has incurred, and will incur in the future, great pain, suffering and disability, medical expenses and lost wages, all to her damage in a sum to be determined at trial.

12. The Hubanks are strictly liable for violations of Chapter 78 of the Milwaukee Code

of Ordinances which resulted in the injury to Officer Cole.

13. The Hubanks are strictly liable for violations of section 174.02, Wis. Stats. which resulted in the injury to Officer Cole.

WHEREFORE, plaintiff demands judgment:

a. Against the defendants, awarding compensatory damages in an amount to be determined at trial;

b. Double damages, as provided under §174.02(1)(b), Wis. Stats.;

c. Penalties as required under §174.02(2), Wis. Stats.;

d. Awarding the plaintiff her reasonable costs and disbursements in this action; and

e. Such other relief the Court finds as just and reasonable.

Dated this 22nd day of October, 2001.

EGGERT & CERMELE, S.C.
Attorneys for the Plaintiff, Julia Cole

Jonathan Cermele
State Bar No.: 1020228

Mailing Address:
1840 North Farwell Avenue
Suite 303
Milwaukee, WI 53202
(414) 276-8750
(414) 276-8906 (FAX)

Plaintiff hereby demands trial by a 12 person jury pursuant to §805.01(2) and §756.096(3)(b), STATS.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

and

CITY OF MILWAUKEE,

Involuntary Plaintiff, Case No. 01-CV-007770

vs.

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

NOW COME the defendants Yvonne L. Hubanks and Aubrey Hubanks, by their attorneys, PETERSON, JOHNSON & MURRAY, S.C., and in answer to the amended complaint of the plaintiff, admit, deny, allege and show to the court as follows:

1. In answer to paragraph 1, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

2. In answer to paragraph 2, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

3. In answer to paragraph 3, admit the allegations contained therein.

4. In answer to paragraph 4, admit the allegations contained therein except that such policy of insurance was and is subject to all the terms, provisions, limitations, exclusions,

conditions contained therein and deny that such policy covers injuries such as those alleged in the complaint.

5. In answer to paragraph 5, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

6. In answer to paragraph 6, admit the Hubanks did own an Akita dog, but deny knowledge or information sufficient to form a belief as to whether such dog attacked Officer Cole.

7. In answer to paragraph 7, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

8. In answer to paragraph 8, deny any negligence or carelessness on the part of these answering defendants, deny that they allowed their dog to run at large, and deny knowledge or information sufficient to form a belief as to whether their dog attacked the plaintiff.

9. In answer to paragraph 9, deny any negligence or carelessness on the part of these answering defendants, in the manner in which they restrained their Akita, deny that they failed to properly secure their Akita, and deny knowledge or information sufficient to form a belief as to whether the dog attacked and injured the plaintiff.

10. In answer to paragraph 10, deny knowledge or information sufficient to form a belief as to every allegation contained therein.

11. In answer to paragraph 11, deny any negligence or carelessness on the part of these answering defendants, or either of them, deny that any alleged negligence or carelessness on the part of either caused or resulted in any injury or damage to the plaintiff, and deny knowledge or information sufficient to form a belief as to every other allegation contained therein.

12. In answer to paragraph 12, deny each and every allegation contained therein.

13. In answer to paragraph 13, deny each and every allegation contained therein.

14. As and for a first affirmative defense, allege that at and prior to the accident involved herein, the plaintiff was careless and negligent and that such carelessness and negligence was the sole and exclusive cause of any injuries or damages allegedly sustained by her.

15. As and for a second affirmative defense, allege that the complaint fails to state a claim upon which relief can be granted.

16. As and for a third affirmative defense, allege that the plaintiff may have received benefits pursuant to policies or plans of health, medical, disability or workers compensation insurance and that, to the extent of any benefits so received, such insurers or groups are subrogated, necessary parties hereto and the real parties in interest.

WHEREFORE, these answering defendants demand judgment dismissing the amended complaint, on the merits, with costs and disbursements and such other relief as may be just or equitable.

TRIAL BY A JURY OF 12 OF ALL ISSUES PROPERLY TRIABLE TO A JURY IS HEREBY DEMANDED.

Dated at Milwaukee, Wisconsin, this 31th day of October, 2001.

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants

By: _____
Ricardo Perez
State Bar No. 1035351

P.O. ADDRESS:
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Milwaukee, WI 53202-4792
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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JULIA COLE,

Plaintiff,

and

CITY OF MILWAUKEE,

Involuntary Plaintiff, Case No. 01-CV-007770

vs.

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

BRIEF IN SUPPORT OF MOTION SUMMARY JUDGMENT

This lawsuit arises out of a dog bite that occurred on January 8, 2001. The plaintiff, while on duty as a police officer for the City of Milwaukee, came upon an Akita dog owned by the defendants, Hubanks, which had been running loose. She attempted to gain control of the dog, but while in the process, the dog bit her in her face, neck and ear areas.

Plaintiff brought this suit against the owners of the dog and their insurance company, alleging that they were negligent in several respects. In her amended complaint, the plaintiff alleges that the Hubanks were negligent as follows:

1. In the manner in which they cared for the dog, allowing it to run at large; (Plaintiff's amended complaint at ¶ 8)

2. In the manner in which they restrained the dog which attacked the plaintiff, by failing to properly secure it (Plaintiff's amended complaint at ¶ 9)

3. In knowingly continuing to harbor what they knew to be a dangerous animal. (Plaintiff's amended complaint at ¶ 10)

4. In failing to properly confine and muzzle the dog, given its known dangerous propensities; (Plaintiff's amended complaint at ¶ 10)

5. In failing to warn the public as to the known dangerous nature of their dog, by means of placement of a muzzle on it or otherwise; (Plaintiff's amended complaint at ¶ 10).

Under the rule commonly referred to as the "firefighter's rule," defendants respectfully request this court to grant summary judgment to them dismissing plaintiff's amended complaint on its merits and with costs.

I. THE FIREFIGHTER'S RULE PRECLUDES RECOVERY.

The firefighter's rule was most recently discussed by the Supreme Court of Wisconsin in Pinter v. American Family Mutual Ins. Co., 236 Wis. 2d 137, 613 N.W.2d 110. In that case, an emergency medical technician had sustained injuries while providing emergency assistance to a passenger who had been injured in an automobile accident. He brought an action against the drivers of the automobiles involved in the accident, and argued that his injuries were the direct and proximate result of their negligence. Pinter at 137. The defendants moved for summary judgment, arguing that the "firefighter's rule" barred any negligence action against the drivers by the EMT. The trial court granted the motion. The summary judgment was appealed to the Court of Appeals, and the Court of Appeals certified it to the Supreme Court. The Supreme Court ultimately affirmed the judgment of the circuit court dismissing the case on summary judgment.

The "firefighter's rule" was first set forth in Hass v. Chicago & North Western Railway, 48 Wis. 2d 321, 179 N.W.2d 885 (1970). In that case, the court held that "one who negligently starts a fire is not liable for that negligence when it causes injury to a firefighter who comes to extinguish

the blaze." Hass at 327. Although Hass involved a firefighter, the Supreme Court in Pinter held that the rule was applicable to an EMT as well.

The Pinter court noted that most jurisdictions across the country limit liability in negligence cases under a theory of law commonly termed the "firefighter's rule." Pinter at 144. The Pinter court noted that as applied to firefighters, this rule limits a firefighter's ability to recover damages for injuries sustained while performing his or her duties as a firefighter. Pinter at 144. The court also noted that more recently, courts have justified the rule on public policy grounds. Pinter at 145. Various cases since the Hass case have clarified the Hass decision to indicate that it only precludes a negligence action when it is based on the initial act of negligence that caused the fire and necessitated rescue. In the present case, the negligence action against the dog owners is based on their initial acts of alleged negligence, in failing to secure their dog and muzzle him. Those are the acts of alleged negligence which called Officer Cole to the scene where she was injured by the dog. Thus, pursuant to the "firefighter's rule", the Hubanks cannot be liable for the damages sustained by Cole.

In Pinter, the court considered the public policy analysis set forth in the Hass decision, and noted that:

> We are convinced that the public policy analysis in Hass remains sound. It is still true that nearly all fires are caused by negligence. See Hass 48 Wis. 2d at 327, 179 N.W.2d 885. It is therefore still true that permitting firefighters to pursue negligence actions based on the negligent act of starting a fire would place an unreasonable burden on the owners and occupiers of premises and would enter a field with no sensible or just stopping point. See Id.

Pinter at 154.

The court went on to note that the "firefighter's rule" would be extended to the plaintiff in this case, an EMT. The Pinter court noted that firefighting and emergency medical assistants are closely related professions. The court noted that members of these professions have special training and experience to prepare them to provide assistance under dangerous emergency conditions. People in these professions know they will be expected to provide aid and protection to others in hazardous circumstances, and, both are professions wherein they are considered professional rescuers specially trained and employed to conduct rescue operations in dangerous emergencies. Pinter at 156.

In the present case, the plaintiff is a police officer. She had to have special training to prepare her for her dangerous occupation. She knew, in becoming a police officer, that she would be required to provide aid and protection to others in hazardous circumstances. She chose to attempt to catch the defendant's dog as part of her job as a police officer. Clearly, a police officer should fall into the same category as a firefighter or EMT and the "firefighter's rule" should apply in this case.

CONCLUSION

Based on the foregoing arguments and authorities, defendants respectfully request that this court grant their motion for summary judgment, and dismiss the plaintiff's claims on the merits and with costs.

Respectfully submitted,

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants

By: Janet E Cain

Janet E. Cain
State Bar No. 01002721

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STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE

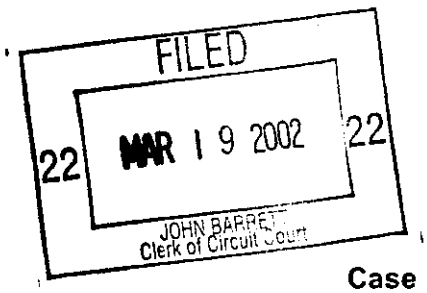
Plaintiff,

and

CITY OF MILWAUKEE

Involuntary Plaintiff,

v.



Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The above named plaintiff, by her attorneys, Eggert & Cermele, S.C. and Jonathan Cermele, as and for her Brief in Opposition To Defendants' Motion For Summary Judgment, alleges and shows to the court as follows:

I. FACTS

On January 8, 2001, Police Officer Julia Cole ("Officer Cole") was traveling in a marked Milwaukee Police Department ("MPD") squad car westbound on Villard Ave., at the approximate intersection of 55th Street, when she saw a dog dragging an 8 foot chain crossing Villard Ave. ***Officer Cole's Deposition Transcript,*** *marked as "Exhibit A" to the* ***Affidavit of Jonathan Cermele*** *@ 23-24.* She was never dispatched to the scene, but simply happened upon the stray dog. ***Id.*** *@ 24.*

By the time the squad car had come to a stop, the dog had crossed Villard Ave. and was walking slowly Northbound on 55th Street. ***Id.*** *@ 26.* Officer Cole grabbed the end of the chain

with her left hand, using her right hand to beckon the dog closer, and continually talking to the dog in a calm manner. ***Id.*** @ *30 & 33.* At all times she tried to be cautious so as not to scare the dog. ***Id.***

Officer Cole estimated the dog to weigh 85-90 pounds. ***Id.*** @ *32.* It appeared calm and "happy;" walking slowly toward her and wagging its tail. ***Id.*** @ *30.* It did not appear vicious. ***Id.*** Officer Cole squatted down and let the dog sniff her hand. ***Id.***

Then, without warning or provocation, the dog lunged at Officer Cole's neck, knocking her to the ground and "latching on to [her] face." ***Id.*** @ *33.* Officer Cole was shocked. ***Id.*** She had assumed the dog would have growled, barked or shown some aggressive posture if it was going to attack. ***Id.*** @ *34.* Eventually, she was able to use her left hand to push the dog off her face. ***Id.*** @ *34.* She unholstered her service weapon and aimed at the dog in case it attacked again. ***Id.*** @ *25.* However, the dog just sat there and stared at her. ***Id.*** @ *35.*

Officer Cole again grabbed the chain to keep the dog from running away. As a result of the dog bites, Officer Cole received 3 lacerations; 1 on the right earlobe, where "it was almost torn off"; one close to the right carotid artery, and; one just below the right jaw line. ***Id.*** @ *39.* She was taken from the scene by ambulance to St. Joseph's Hospital where she received thirty stitches to her face and ear. ***Id.*** @ *38.*

At no time did the dog growl or give any indication it would attack. ***Id.*** @ *39.*

II. ANALYSIS

Defendants urge this Court to expand the current law in relation to the Firefighter's Rule ("Rule"), seeking its application to a Police Officer who was severely injured after coming upon a situation where the Police Officer determined it was necessary to take police action. Defendants provide no reason as to why the existing legal standards for applying the Rule should be modified and then applied to bar Officer Cole's cause of action.

Plaintiff requests this Court to deny defendants' Motion, on the grounds that 1) public policy is not furthered by expanding the Rule to Police Officers, and that, 2) the Rule is not a bar to Officer Cole's specific causes of action.

A. Origin of the Firefighter's Rule in Wisconsin.

The Rule was initially adopted in Wisconsin as a result of our Supreme Court's decision in ***Hass v. Chicago & Northwestern Railway***, *48 Wis.2d 321, 179 N.W.2d 885 (1970).* There, a firefighter was injured when he *responded* to a fire which was allegedly caused by the negligence of a railroad. The plaintiff sued the railroad, alleging general negligence and failure to warn. The Court dismissed both claims, reasoning that the hazards of fire were apparent and the landowner had no duty to warn a firefighter. The Court stated:

> *The hazard of fire feared by the landowner and for which he asks aid in fighting is the very reason for the summons to duty*. The call to duty is the warning of the hazard; and even *in the absence of a summons by the occupier of the land, the hazards of the fire are apparent* . . . the duty of a landowner to a firefighter in respect to a warning of the hazard is satisfied by the very nature of the call for assistance. ***Id.*** *@ 324-324, 179 N.W.2d @ 887. (emphasis added)*

The Court then held that one who negligently starts a fire cannot be liable for that negligence when it causes injury to a firefighter who comes to extinguish the blaze. ***Id.*** *@ 327, 179 N.W.2d @ 888.*

B. Subsequent modifications to, and interpretations of, the Rule.

Clark v. Corby, *75 Wis.2d 292, 249 N.W.2d 567 (1977)*, addressed the Rule in terms of whether a landowner owes any duty to a firefighter who is injured while fighting a fire, where the injury is due to "special hazards." There, the plaintiff firefighter had sued under three different

theories of liability: 1) common negligence for starting the fire; 2) negligence in failing to warn of known hidden-hazzards, and; 3) negligence for violating housing codes. The Court dismissed the common negligence claim under ***Hass***, but allowed the other claims to proceed to trial. In so doing, the Court held that:

> 1. The Rule was not a bar to a claim of failure-to-warn;
>
> 2. A homeowner has a duty to warn a firefighter of hidden hazzards known to homeowner but not the firefighter, where homeowner had the opportunity to warn, and;
>
> 3. The Rule was not a bar to a negligence claim based upon a municipal code violation, if the plaintiff could prove the housing code was enacted to protect a firefighter in the performance of his duties. ***Id.*** *@ 297-300, 294 N.W.2d @ 570-573.*

Wright v. Coleman*, 148 Wis.2d 897,436 N.W.2d 884 (1989),* addressed the Rule in terms of whether a defendant had a duty to warn of known hazards, as opposed to the"hidden" hazards in ***Clark***. In ***Wright***, a firefighter was injured when he slipped on ice at a fire scene. The Court found the homeowner had a duty to warn of known hazzards, and that the homeowner would be negligent for failure to warn if, under the circumstances, it would have been reasonable to do so. ***Id.*** *@ 907, 436 N.W.2d @ 869.* The Rule is therefore not a bar to a claim based upon failure to warn.

However, **Wright** is also significant because it clarified the general holding in ***Hass***, stating that the Rule was "nothing more than a *limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread.*" ***Hauboldt*** *@ 673, 467 N.W.2d @ 512, citing to* ***Wright*** *@ 902, 436 N.W.2d 864. (emphasis added).*

Hauboldt v. Union Carbide*, 160 Wis.2d 662, 467 N.W.2d 508 (1991)* addressed the Rule in terms of whether a firefighter could proceed against a 3rd party for injuries sustained in the course

of a fire. There, a firefighter was injured by the unexpected explosion of a defective acetylene tank and not by the fire or structural damage incidentally resulting from the explosion. ***Hauboldt*** stands for the proposition that, if a firefighter didn't have an opportunity to prepare for the danger which caused his injury, and the danger was not apparent or anticipated, a cause of action based upon injuries resulting from an intervening event can proceed. ***Id.*** *@ 667, 467 N.W.2d @ 508.*

The most recent Supreme Court decision came in ***Pinter v. American Family Insurance Co.***, *2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110 (2000).* There, the Court recognized that ***Hass*** barred a cause of action *only when the sole negligent act is the same negligent act that necessitated rescue and therefore brought the firefighter to the scene of the emergency*. ***Id.*** *2000 WI 75 @ ¶ 31, 236 Wis.2d 137, 613 N.W.2d 110.*

Pinter extended the Rule beyond its historical context of applying only to firefighters, and applied it to an Emergency Medical Technician ("EMT") who was *dispatched* to the scene of a motor vehicle accident and was injured while attempting to rescue a motorist. Expansion of the Rule to encompass EMT's was due, in its entirety, to the extremely similar professions of firefighter and EMT; both were specifically trained for, and had as their sole or major function, life saving and rescuing. ***Id.*** *@ ¶ 43 & 44.* The Court stated:

> . . . *Firefighting and emergency medical assistance are closely related professions*; like Pinter, some EMT's also serve as firefighters. Members of both professions have special training and experience that prepare them to provide assistance under dangerous and emergency conditions . . . *In short, both firefighters and EMT's are professional rescuers who are specifically trained and employed to conduct rescue operations in dangerous emergencies* . . . . *(emphasis added).*
>
> * * *
>
> *The facts of Pinter's case illustrate this point. Pinter had helped to extricate injured individuals from automobiles on over two hundred occasions*. Pinter's

> injury occurred because he was required to maintain an awkward position for an extended period of time to avoid aggravating the passenger's spinal injuries. *Thus, because of his position as a specially trained, experienced EMT, Pinter was asked to put himself in harm's way for the protection of another, more seriously endangered individual* . . . . ***Id.*** @ ¶43-44. *(emphasis added).*

The main function of Police Officers, on the other hand, is the detection and prevention of crime and the apprehension of criminals. ***Affidavit of Jonathan Cermele*** @ *Exhibit C @ p.136 (i.e., Milwaukee City Charter, §22-08, Police Powers & Duties).* While Police Officers may, in the course of their employment, occasionally enter into the "rescuer" mode, those situations are few and far between, and certainly neither their primary function, nor one for which they are trained. ***Affidavit of Bradley DeBraska.***

The most recent pronouncement of the Rule came from our Court of Appeals in ***Mullen v. Cedar River Lumbar Co.***, *246 Wis.2d 524, 630 N.W.2d 574 (Ct.App. 2001).* That case addressed whether a superintendent of public works who was injured when responding to an oil spill, could maintain a cause of action against the company whose truck had dumped the oil. There, the defendants sought to apply the Rule under ***Hass*** and ***Pinter***, arguing that the plaintiff, as superintendent of public works, had special knowledge & experience in oil spills and was specifically called to the scene because of that knowledge and experience. However, the Court of Appeals distinguished ***Hass*** and ***Pinter***, stating that firefighters & EMT's were both professional rescuers who were specifically trained and employed to conduct rescue operations in dangerous emergencies. The Court stated:

> *Although the superintendent had experience and some training in responding to fuel oil spills, fuel oil spills constitute only a small part of plaintiff's job as superintendent of public works* (i.e. also responsible for garbage removal, recycling program, road maintenance and snow removal). ***Id.*** @ ¶15. (emphasis added)

> Given Mullen's limited duties at the time of a fuel spill and the infrequency of spills to which he responds, we are unpersuaded that Mullen's role is sufficiently similar to the role of firefighters and EMT's to justify extending the firefighter's rule to include Mullen. Unlike firefighters and EMT's, Mullen is not a professional rescuer who is "specially trained and employed to conduct rescue operations." ***Id.*** @ ¶16, *citing* ***Pinter*** *2000 WI 75 @ ¶ 43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added).*

Defendants would have this Court expand 30 plus years of case law and apply the Rule to Police Officers, where it never has been applied previously. Not only is there no viable legal argument as to why to apply the Rule to Police Officers in general, the facts in this case certainly do not warrant its application.

C. Public Policy is not furthered by expanding the Rule to include Police Officers.

Other than ***Pinter***, every single case addressing the Rule limited its application to firefighters. ***Pinter*** expanded the Rule to EMT's, based solely on the extreme similarity between the two professions, in terms of training, experience and purpose/function. ***Id.*** *, 2000 WI 75 @ ¶ 43 & 44, 236 Wis.2d 137, 613 N.W.2d 110.*

However, our Court of Appeals in ***Mullen*** declined to accept the argument that, because of that plaintiff's "special knowledge and experience," the Rule should be expanded to also include a superintendent of public works. ***Id.,*** *2000 WI App. 142 @ ¶15-16, 246 Wis.2d 524, 630 N.W.2d 574.* ***Mullen*** downplayed the fact that the plaintiff had possessed "experience and some training" in relation to the purpose for him being on the scene. Instead, ***Mullen*** focused on the fact that the reason for the plaintiff responding to the scene, was "only a small part of plaintiff's job" as the superintendent of public works. ***Id.***

The primary function of a Police Officer is not to rescue citizens. ***Affidavit of Bradley DeBraska. Also, Affidavit of Jonathan Cermele*** @ *Exhibit C @ p.136 (i.e., Milwaukee City*

Charter, §22-08, Police Powers & Duties). Police Officers are taught to call either the Fire Department or an ambulance when they come upon an individual in need of medical assistance or rescue. ***Id.*** In rare events, a Police Officer may attempt a rescue or provide extremely basic first aid. ***Id.*** However, as was the case in ***Mullen***, those functions would constitute only a very minor part of a Police Officer's job. ***Affidavit of Bradley DeBraska.***

Similarly, catching stray dogs is not the primary function of a Police Officer. ***See Id.*** While "peace officers" are one category of individuals, along with those of "humane officer" and "local health officer" who have an obligation to capture and restrain a dog running at large, it is certainly not a Police Officer's primary function, nor one which an officer would even expect to perform with any frequency of any consequence. ***Id.***

The Rule is "nothing more than a *limited exception to the general rule of liability for negligence, immunizing landowners or occupiers who negligently start a fire or negligently fail to curtail its spread.*" ***Hauboldt*** *@ 673, 467 N.W.2d @ 512, citing to* ***Wright*** *@ 902, 436 N.W.2d 864. (emphasis added).* Expanding the Rule to apply to Police Officers would only serve to allow the "limited exception" to swallow the general rule. If the Rule were expanded as urged by defendants, it would be a complete defense to such heretofore uncontemplated situations, such as:

- Barring a building inspector from suing the landowner for negligently failing to properly maintain the structure being inspected, when the inspector is injured after falling through a rotten floor while inspecting the building;
- Barring the surviving spouse of a construction worker from suing a general contractor for wrongful death based upon negligent supervision, after the construction worker is killed when the earthen walls surrounding the ditch he is digging collapse and crush him to death, and/or;
- Barring nurses who work in emergency rooms or ambulances from suing negligent patients when they are injured as a result of the patient's negligence.

As these examples demonstrate, expanding the Rule to Police Officers would be against public policy, as it would "enter a field that has no sensible or just stopping point." ***Hass*** @ *327, citing* ***Colla v. Mandella****, 1 Wis.2d 594, 598, 85 N.W.2d 345, 348 (1957).* Such an expansion would also be inconsistent with the public policy stated in ***Pinter*** (i.e., because EMT's, like firefighters, are *professional rescuers who are highly trained in life saving procedures*, they will be precluded from bringing a claim of negligence based *solely* upon the same negligent act which necessitated the rescue and therefore *brought* the firefighter/EMT to the scene of the emergency). ***See Pinter****, 2000 WI 75 @ 31, 236 Wis.2d 137, 613 N.W.2d 110.*

It is only in the unusual or very clear case that a court can conclude, as was done in ***Haas*** and ***Pinter***, that, despite negligent conduct, as a matter of law (i.e., appropriate public policy) there shall be no recovery. ***Wright*** *@ 908, 436 N.W.2d @ 868-869.* As a result, the public policy which led ***Pinter*** to expand the Rule to EMT's doesn't exist in the present case, this Court should be guided by our Court of Appeals' decision in ***Mullen*** and refuse to apply the Rule to Police Officers.

D. Neither of defendants' theories as to why the Rule should apply to Officer Cole is persuasive.

Defendants base their motion on two theories. They argue that Officer Cole's training and experience supports applying the Rule under ***Pinter. Defendants' Brief In Support Of Motion For Summary Judgment*** *@ 4.* They also argue that, because Officer Cole's claims are based upon the defendants' "initial acts of alleged negligence in failing to secure their dog and muzzle him," the Rule bars all of Officer Cole's claims. As authority for that assertion, defendants refer to the "[v]arious," yet un-cited, cases since ***Hass*** which, according to defendants, have clarified ***Hass*** to indicate that it "only precludes a negligence action when it is based upon the initial act of negligence that caused the fire and necessitated rescue." ***Defendants' Brief*** *@ 3.*

Neither argument is sufficient to expand the Rule to apply to Officer Cole's causes of action.

First, the cases to which defendants refer limited the Rule to firefighters, and pertained ONLY to the "initial act of negligence that caused the fire and necessitated the rescue." ***Id.*** Not only does this case *not* involve either a fire or a rescue, Officer Cole's claims fit within recognized exceptions to the Rule. As such, none of the cases to which defendants refer serve as authority for their assertion. Second, defendants cannot overcome the fact that, in ***Mullen***, our Court of Appeals declined to enlarge the scope of the Rule beyond the two similar occupations of firefighter and EMT.

i. The training received by Police Officers is insufficient to warrant application of the Rule under *Pinter*.

Officer Cole simply had no training which would have prepared her for what she encountered. As indicated previously, unlike as is the case with firefighters and EMT's, the main function of Police Officers is the detection and prevention of crime and the apprehension of criminals. ***Affidavit of Bradley DeBraska.*** A Police Officer's training, whether it be in the Police Safety Academy at the beginning of their career or thereafter, is focused on those functions. ***Id.*** While Police Officers may, in the course of their employment, occasionally enter into the "rescuer" mode, those situations are few and far between, and certainly not their primary function, nor one for which they are trained. ***Id.***

Moreover, the MPD doesn't provide any training on how to capture or handle stray dogs. ***Officer Cole's Deposition Transcript*** *@ 11, attached as* ***"Exhibit A" to the Affidavit of Jonathan Cermele.*** Although some MPD squad cars are equipped with a "noose" which is capable of snaring a stray animal, the squad to which Officer Cole was assigned on January 8, 2001, didn't have such a device. ***Id.*** *@ 20.* Even if it had, the MPD doesn't provide any training on how to use the device. ***Id.*** *@ 19.* Furthermore, Officer Cole has never used it herself, nor has she ever seen anyone use it. ***Id.***

ii. Officer Cole's experience in dealing with stray dogs is insufficient to warrant application of the Rule.

Officer Cole never had any experience catching stray dogs during her 12 week "Field Training" after graduating from the Police Safety Academy. ***Id.*** @ *14*. She never had any experience working with dogs, other than those which she had owned herself. ***Id.*** @ *30-31*. Prior to her being bitten, Officer Cole had caught a stray dog on only 3-4 occasions. ***Id.*** @ *15 & 27*. Her lack of experience in dealing with stray dogs is typical. ***Affidavit of Bradley DeBraska***.

As a result of the lack of training on how to restrain and capture stray dogs, Officer Cole's insignificant experience in performing such activities, and the fact that such activity constitutes such an extremely small portion of an Officer's activities, ***Mullen*** prohibits the use of the Rule to bar Officer Cole's claims.

E. The Rule doesn't bar Officer Cole's claims, because they are not based "solely" on the defendants' "initial acts of alleged negligence."

The "[v]arious cases" to which defendants allude since ***Hass***, are ***Clark v. Corby***, ***Wright v. Coleman***, ***Hauboldt v. Union Carbide***, ***Pinter v. American Family*** and ***Mullen v. Cedar River Lumbar Co.*** According to those cases, the Rule does not constitute a bar to any of Officer Cole's causes of action.

Officer Cole's Amended Complaint alleges negligence by defendants under the following theories:

- In the manner in which they cared for the Akita which attacked and injured Officer Cole, allowing it to run at large. ***Amended Complaint*** @ ¶ *8*.
- In the manner in which they restrained the Akita which attacked and injured Officer Cole, by failing to properly secure the Akita. ***Id.*** @ ¶ *9*.
- Violating Chapter 78 of the Milwaukee Code of Ordinances, by knowingly continuing to harbor what they knew to be a

dangerous animal, as that term is defined in Chapter 78 of the Milwaukee Code of Ordinances. ***Id.*** @ ¶ *10.*

- Violating Chapter 78 of the Milwaukee Code of Ordinances, by failing to properly confine and muzzle the Akita, given its known dangerous propensities, in violation of Chapter 78 of the Milwaukee Code of Ordinances. ***Id.***

- Failing to warn the public as to the known dangerous nature of their Akita, by means of placement of a muzzle on the Akita or otherwise, where the Akita had, on information and belief, on at least one prior occasion, attacked, without provocation or warning, and injured another citizen, in violation of Chapter 78 of the Milwaukee Code of Ordinances. ***Id.***

- Strict liability for violations of Chapter 78 of the Milwaukee Code of Ordinances which resulted in the injury to Officer Cole. ***Id.*** @ ¶ *12, and.*

- Strict liability for violations of §174.02, Wis. Stats. which resulted in the injury to Officer Cole. ***Id.*** @ ¶ *13.*

i. Any and all causes of action based upon a violation of a Milwaukee Ordinance survive.

All causes based upon a violation of the Milwaukee Code of Ordinances survive, as long as Officer Cole can demonstrate that she, as a Police Officer, was within the scope of those whom the ordinance was meant to protect. ***Clark*** *@ 299-300.*

An example where an ordinance would not be meant to protect a plaintiff in the context of the Rule, would be as follows: a firefighter who responds to a fire is burned and sues the homeowner under the theory that the plaintiff failed to comply with an ordinance regulating the removal of lead-based paint. It's reasonable to presume that the intent behind such an ordinance would be to protect people, and especially children, who may come in contact with such a toxic substance. However, because it would not be reasonable to presume the purpose for that ordinance would be to protect people from being burned, it would not serve to insulate a claim from the scope of the Rule.

The municipal ordinance violations alleged in the Amended complaint are meant to protect the safety of the public from dangerous animals. ***See Affidavit of Jonathan Cermele, @ Exhibit B.*** Obviously, Officer Cole is a member of the public. The mere fact that, at the time of her injury she was acting in her capacity as a Police Officer, is not sufficient to take her out of the scope of the ordinance.

Under ***Clark***, all of Officer Cole's causes of action based upon a municipal violation survive. Furthermore, the two causes of action not couched in terms of a municipal violation (i.e., negligence in the manner in which defendants cared for and restrained the dog by allowing it to run at large and not be properly secured) contained in ¶ 8 & 9 of the Amended Complaint, also survive because municipal ordinances regulate the confinement of a dangerous animal. ***See Affidavit of Jonathan Cermele*** *@ Exhibit B.*

ii. Any and all of Officer Cole's causes of action based upon a failure to warn survive.

There is simply no authority to suggest that the Rule bars a cause of action based upon failure to warn. In fact, claims based upon failure to warn have been specifically *excluded* from the Rule's applicability. ***Clark v. Corby*** *@ 299-300, and* ***Wright v. Coleman*** *@ 907.*

Hidden hazzards, such as the propensity of defendants' dog to attack without provocation, are not subject to the Rule where the owner had the opportunity to warn. ***Clark*** *@ 299-300.* As alleged in the Amended Complaint, defendants had the opportunity to warn and could have warned by simply complying with the ordinance which required use of a muzzle; it is reasonable to presume that, if an individual came in contact with a muzzled dog, he/she would presume the dog to be dangerous and, thereby, have been warned of its propensity to attack.

Known hazzards, such as the propensity of defendants' dog to attack without provocation, are also excluded from the Rule where, under the circumstances, it would have been reasonable

to warn. ***Wright*** *@ 907.* Given that Chapter 78 of the Milwaukee Code of Ordinances specifically requires confinement and the use of a muzzle, the "reasonableness" of having to warn must be presumed as a matter of law.

As a result, all of Officer Cole's causes of action alleging a failure to warn survive Under ***Clark*** and ***Wright.***

III. CONCLUSION

For all the above-stated reasons, Officer Cole respectfully requests that this Court deny defendants' Motion for Summary Judgment on the basis that, because public policy is not furthered by expanding the Rule to include Police Officers, defendants are not entitled to judgment as a matter of law. In the alternative, Officer Cole would request the Court decline to address the public policy, and deny defendants' motion for Summary Judgment on the basis that, because all of Officer Cole's claims fit within recognized exceptions to the Rule, as set forth in ***Clark v. Corby*** and ***Wright v. Coleman*** (i.e., they address allegations of: 1) failure to warn where it was both reasonable to warn and defendants had an opportunity to warn, and; 2) municipal violations which are meant to protect persons such as Officer Cole), defendants are not entitled to judgment as a matter of law.

Dated this 19th day of March, 2002.

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FILE COPY

March 19, 2002

Hon. William J. Haese
Circuit Court Judge, Branch 22
Milwaukee County Courthouse
901 North 9th Street
Milwaukee, WI 53233

RE: Cole v. Hubanks, et al.
Case No. 01-CV-000770

Dear Judge Haese:

Enclosed for filing on behalf of the Plaintiff, is an original and a copy of:

- Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment;
- Affidavit of Bradley DeBraska In Opposition To Defendants' Motion For Summary Judgment, and;
- Affidavit of Jonathan Cermele in Opposition To Defendants' Motion For Summary Judgment.

If all meets with your approval, please have your clerk file these documents and return a conformed copy to my messenger.

By copy of this letter, Atty. Janet Cain is being served with this letter and its enclosures by regular US Mail.

Sincerely,

EGGERT & CERMELE, S.C.

/s/

Jonathan Cermele

JC/ldl
Enclosures
pc: P.O. Julia Cole (Via US Mail w/enc)
Atty. Janet Cain (Via US Mail w/enc)
\CAIN SJ CVR

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE

Plaintiff,

and

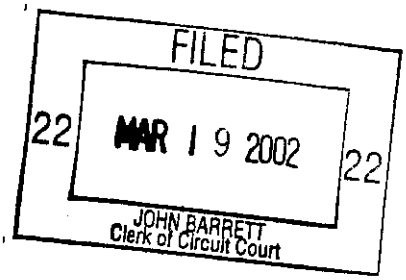
CITY OF MILWAUKEE

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

Defendants.



Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

AFFIDAVIT OF JONATHAN CERMELE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN }
} ss.
MILWAUKEE COUNTY }

I, Jonathan Cermele, being duly sworn upon oath do state that:

1. I am legal counsel for the plaintiff in this action;

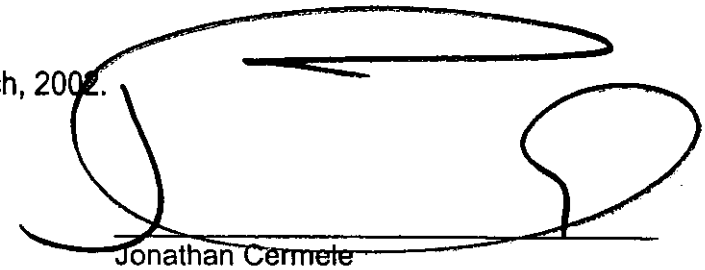
2. I have knowledge of the facts stated herein;

3. Attached and marked as "Exhibit A" is a true and correct copy of those pages of Officer Cole's deposition which are cited in Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment.

4. Attached and marked as "Exhibit B" is a true and correct copy of Chapter 78 of the Milwaukee Code of Ordinances, as referenced and cited in Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment, with those sections pertinent to Officer Cole's causes of action highlighted.

5. Attached and marked as "Exhibit C" is a true and correct copy of Chapter 22 of the Milwaukee City Charter, as referenced and cited in Plaintiff's Brief In Opposition To Defendants' Motion For Summary Judgment, with those sections pertinent to Officer Cole's causes of action highlighted.

Dated this 19th day of March, 2002.



Jonathan Cermele

Subscribed and sworn to before me this
19th day of March, 2002.

Notary Public, State of Wisconsin
My commission: 6-16-02

IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

STATE OF WISCONSIN

JULIA COLE,

Plaintiff,

COPY

CITY OF MILWAUKEE,

Involuntary Plaintiff,

-vs-

Case No. 01-CV-007770

YVONNE L. HUBANKS
AUBREY HUBANKS
and
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants.

Examination of JULIA COLE, taken at the instance of the Defendants, under and pursuant to Section 804.05 of the Wisconsin Statutes, pursuant to Stipulation by Respective Counsel, before DEBORAH D. GOFF, a Notary Public in and for the State of Wisconsin, at Milwaukee Police Association, 1840 North Farwell Avenue, Milwaukee, Wisconsin, on the 25th day of February, 2002, commencing at 2:10 p.m. and concluding at 3:17 p.m.

A Correct. Then you do field training, 12 weeks of field training.

Q Are you paid as a student at the academy?

A Yes. Yes.

Q And you said it's about six months of training at the academy, and then 12 weeks of field training?

A Correct.

Q In that six-month time period, that's all classroom training?

A It's classroom training, you do physical training, and DAT training.

Q What does that mean?

A Defense and Arrest Tactics.

Q Okay. Do you have to take some sort of an exam after you complete the training?

A There's many exams during --

Q -- during the process?

A Yes.

Q During that -- let's talk about the six months that you're in the academy before the field training. During that time, do you have any training with respect to how to handle stray dogs?

A Unfortunately, no. I wish there would be, but there is none. There's not even anything on how to use the noose that's in the car.

A But if that person should be out sick or something, then you might have to be partnered with someone else for that day.

Q Okay. In the 12 weeks that you had the field training after you completed the academy, did you have the experience at all of dealing with a loose dog?

A No, I did not.

Q Okay. At any time prior to January 8th of 2001, while a police officer, did you have any occasion to deal with a loose or stray dog that you encountered while in the course of your employment as a police officer?

A A couple times I've had calls where you get there a lot of times, the dog's not there. They're usually gone. And maybe two or three times I've gotten there where -- received a call of a loose dog and the dog was there and I caught the dog and brought it to the station.

Q So typically what happens when there's a loose dog call is someone calls up and says there's this dog running around my neighborhood --

A Right.

Q -- and I want you to come and take care of it. And it's your job at that point to go, usually, and try

Q So instead of trying to grab the dog with your hands, you would hold the pole with your hands and try to slip the round noose part over the dog's --

A Neck.

Q -- snout or neck?

A Yes.

Q That's what you understand the purpose of it to be, correct?

A Yes.

Q But you've never had any training on how to use it, nor have you ever used it yourself; would that be fair?

A Correct.

Q Have you ever seen anyone use it?

A No.

Q These are present in all police vehicles?

A Well, yes. You got to realize, some squad cars don't have everything they should have. They should have one in there, all of them, but not necessarily they have all the equipment they should.

Q Okay. On January 8th of 2001, did the vehicle that you were in have one of these -- you called it a noose. Is that the technical term for this?

A I have no idea.

Q Okay. Let's call it a noose since that's what you called it. We'll call it that for today. Did the vehicle that you were in that day have a noose in it?

A No.

Q Where is it typically kept if it is in a squad car?

A Let me explain why I knew that car -- finish answering the question -- didn't have one. It was a spare car, which means a spare car is something we use when our regular car is in the shop downtown. So that car has very limited equipment.

Q If it is in a squad car, where is it?

A The trunk, it would be.

Q But you were certain that there was no such instrument in the car you were in on January 8th, 2001?

A Yes.

Q Had there been a noose in that vehicle, would you have tried to use it, do you think?

A No. Because the dog had a chain. He was attached to a chain. And I don't feel comfortable using it, so I wouldn't use it being I don't know how to use it.

Q Okay. You say the dog was attached to a chain. This is the dog on January 8th, 2001?

equipment on. And then we have to make sure our weapons -- weapons checked to make sure our weapons are okay, serviceable to use, if we have a round in the chamber and our magazines in, and all that.

Q So after that, then what happens?

A Then we go get our squad car keys, and then we start our shift.

Q Head out.

A Yeah.

Q And it was you and Officer Glick that day?

A Yes.

Q And you and he had known each other for how long?

A Probably at least a year.

Q And not every day, but you frequently were working with him?

A Yes. We worked together a lot.

Q And do you and him get along well?

A Very well. That's why they put us together a lot, because we liked working together.

Q Okay. So you and he get your keys, and you go off. Who typically drives, or does it go back and forth?

A That day he was driving, but it's not -- yeah, I mean, I drive sometimes too.

Q Okay. So that day he's driving, and what -- are you immediately sent off on a call somewhere, or do

you just take off driving around until you get a call that tells you to respond to something?

A I don't remember.

Q Okay.

A I don't remember that.

Q What time was it that you received a call -- strike that. Did you ever receive a call of a loose dog --

A No.

Q -- on that day? No?

A No.

Q Okay. How is it that you encountered the loose dog on January 8th, 2001?

A We had been driving on patrol in the area of Villard and 55th, going westbound when we saw the dog on the south side of the street, crossing the street into the median. And I was concerned about the dog.

Q What street was it that you saw him on, Villard?

A Yes.

Q All right. So you saw the dog on the south side of Villard, starting to walk across the street?

A North, he was going.

Q And is Villard a heavily traveled road?

A Yes. Very. That's why we stay on that street a

westbound or eastbound?

A It's two lanes. I'm sorry. It's two lanes. It's westbound, and we were in the right lane.

Q There's two westbound lanes. Are there also two eastbound lanes?

A Yes.

Q You were in the right lane of westbound Villard?

A Yes.

Q And he stopped there. Did he pull over to the side, or did he just stop in the lane?

A He just stopped.

Q Okay. So he stopped in the right lane. And then where was the dog in relation -- at that point where was the dog in relation to where you had stopped?

A By then he crossed completely over Villard and was headed on the north side of Villard headed north on 55th.

Q The dog was heading on the sidewalk, or the street?

A Sidewalk. He was on the east side of --

Q 55th?

A Yes.

Q Was the dog running, or walking, or how would you describe its movement?

A Walking, slowing. Like, slow trot.

Q Okay. What did you do once the car was stopped?
A I immediately got out real quick because I know if you don't catch a dog right away, it will be gone. It's hard to catch a dog when they're loose. I've tried a few times, maybe six, seven times. It's hard to catch a dog that's running loose.
Q So what was your intent when you got out of the car?
A To catch the dog and get it off the street so it wouldn't get hurt.
Q Okay. And is it pretty much your practice that whenever you see a dog with no person around it who is obviously in control of that dog that you will stop and try to catch that dog?
A Well, I can only remember one other occasion where I had that a dog was -- I stopped where it was running loose.
Q Is that the one you already told me about?
A No. This is another one. But I was with another female officer working that day, Vicki Peterson, and it was a Rottweiler, and we caught it. And I knew where the dog lived, so I knew the dog. I was familiar with the dog, and I knew it wasn't a vicious dog, and I caught it and brought it back to the owner.

A At least 6 to 8 foot.

Q Okay. Excuse me. And by this time you're already on 55th. You're not on Villard anymore, right?

A Just a little north of Villard. Maybe 10, 20 feet north of Villard.

Q And was your partner still in the car?

A Yeah. I think he was pulling over. I think he was pulling over to park the car because he stopped -- like I said, he just stopped.

Q Okay. So you grabbed the chain?

A Yeah, I grabbed the chain. And it was still walking north, and I grabbed it, and I started talking to the dog so it wouldn't be afraid of me. And I just stood there. I didn't go running after the dog. I said "Come here, come here dog." I got down, like kneeling.

And it started walking toward me like it was a happy dog. I thought, oh, this is going to be easy to get this dog. I thought, well, he's a good dog. He seemed like a good dog. He's walking slowly towards me. His body is moving like he's a happy dog. His tail's not down, or anything like that. Kind of wagging. He's just kind of walking towards me. He didn't bark or growl or nothing.

Q Okay. Had you ever had any experience working with

Q How big of a dog is this?
A Ninety pounds, maybe. Eighty-five, 90 pounds.
Q If it's standing on all fours, how tall to the top of his back?
MR. CERMELE: If you know.
THE WITNESS: I can't say. I don't remember.
BY MS. CAIN:
Q Did you recognize what kind of dog this was when you first saw it?
A Not right away, no.
Q When you grabbed its chain, did you recognize what breed of dog this was?
A I wasn't really thinking about that, I don't think.
Q It was a big dog though. It wasn't a poodle.
A Yeah. It wasn't a little dog. It was pretty big. But I'm used to big dogs. Like I said, I had Dobermans and Rottweilers. It doesn't mean that just because they're big they're mean. I got my present dog from the Humane Society and he's a big baby.
Q Okay. What happens next after the dog starts walking slowly towards you and you're holding its chain?
A I'm holding the chain with the left hand, and I

kind of kneeled down with my right hand, put my right hand out because I didn't want to scare the dog. I was going like this. Because I think if you go towards a dog like this, over the top of their head, you're going to scare them. So I went like this, and was talking to the dog in a calm manner trying to be cautious because I didn't want to scare him.

And he didn't seem vicious at all, not barking while I was talking to him. And he was sniffing my hand, sniffing, sniffing, sniffing, and I wasn't moving my hand or nothing.

Q All right. And then what happened?

A Then all of a sudden, which really shocked me, just all of a sudden he just jumped on me on this side of my body and just --

Q On your right side?

A Yeah. And just knocked me down is what it did, and latched onto my face.

Q Okay. Had you been squatting?

A Kind of squatting it would be, yes.

Q So he knocked you over?

A Knocked me on my back.

Q And then he bit you?

A Yeah. Just grabbed on my face.

Q And did he bite you more than once, or was it just once that he bit and then he let go?

A It was the once. He grabbed and he was holding on to my face, and I was on the ground like that. And I couldn't believe it because I thought a dog would growl or bark before they would attack. So I was trying to get my gun to get it off me, and I couldn't because he was right here.

Q He was right there meaning he was on my right shoulder?

A Yeah. Just all the weight was on my shoulder, and so I went with my left hand like this and I went, "No, get back," and I went like this and pushed the dog.

Q Pushed the dog in an outward motion with your left hand?

A Yeah. And then it got off me and just stood there looking at me.

Q Were you still holding on to the chain?

A At that point, no. Then I drew my gun and went like that, then I grabbed the chain.

MR. CERMELE: Can you just describe? You're making a lot of motions here, you took your gun and you went like that. For the record, you've got to tell us what you're doing, okay?

THE WITNESS: I'm sorry. I was able to get my gun at that point, and then I pointed it at the dog in case it would try to attack me again. Because I didn't want to shoot the dog. In case it attacked me again, then I would have to shoot at it because I was on the ground, laying. Then I grabbed the chain so I could hold on to the dog so the dog wouldn't get away.

BY MS. CAIN:

Q Where was your partner, Officer Glick, when this dog was biting you?

A I assume he was parking -- pulling the car over. And then after the incident, later on when I spoke to him, he had told me he was -- I didn't think he did. He didn't see the dog bite me. When he got out of the car, he saw me on the ground with the dog over top of me is what he said.

Q Okay. And after the dog -- after you pushed the dog away, did he just stand there and look at you?

MR. CERMELE: The dog, or Glick?

MS. CAIN: The dog.

THE WITNESS: Uh-huh, yeah. Just sat there looking at me, and never barked or growled or nothing. Didn't move. It just sat down and looked at me. I thought it was weird.

A Milwaukee --

MR. CERMELE: M-A-D --

THE WITNESS: Oh, okay.

BY MS. CAIN:

Q She has to type the word.

A Milwaukee Area Domestic Area Control Center.

MR. CERMELE: M-A-D-A-C-C.

THE WITNESS: Yeah. That's it.

BY MS. CAIN:

Q Okay. And you were then taken by ambulance from the scene to a hospital, correct?

A Yes.

Q Which hospital was it?

A St. Mike's.

Q You were treated in the emergency room there?

A Yes.

Q Did you have to spend an overnight at the hospital?

A No.

Q You were given -- you had stitches then?

A Thirty stitches.

Q And how many cuts or puncture wounds or lacerations did you have?

A Three.

Q Three?

A Three, yes.

Q And you had a total of 30 stitches?
A Yes.
Q Describe where the stitches were.
A In the right earlobe. It was that part about -- you could still see a line there where he about ripped that earlobe off, the right earlobe. Then I had one very close to the carotid artery of the right side, and then just a little below on the jawline on the right side.
Q All right. And you currently have three scars in those three places?
A Yes.
Q Okay. We're going to go off the record for a minute so that I can come a little closer, if you don't mind, and look at your scars.
A Okay.

MS. CAIN: Let's go off the record.

(Discussion off the record.)

BY MS. CAIN:

Q I've now had an opportunity to view those scars, and I think we agreed, and you can correct me if I'm wrong, but the scar on your earlobe is in the shape of a half-moon, and it's a little below where your ear is pierced, correct?
A Correct.

CHAPTER 78
ANIMALS

TABLE

78-1. Definitions. In this chapter:

1. ANIMAL FANCIER means any person in a residential dwelling unit who keeps, harbors, raises or possesses any combination of dogs or cats numbering not less than 4 nor more than 5 animals over the age of 5 months.

2. APPROVED means approved by the commissioner.

3. AT LARGE means an animal is off the premises of its owner and on any public street or alley, school grounds, a public park, or other public grounds or on private property without the permission of the owner or person in lawful control of the property. An animal shall not be deemed to be at large if:

a. It is attached to a leash not more than 6 feet in length which is of sufficient strength to restrain the animal and the leash is held by a person competent to govern the animal and prevent it from annoying or worrying pedestrians or trespassing on private property or trespassing on public property where such animals are forbidden; or

b. It is properly restrained within a motor vehicle; or

c. It is a dangerous animal that is in compliance with the requirements of s. 78-23-2.

4. BODILY HARM means physical pain or injury or any impairment of physical condition.

5. CARETAKER means any person 16 years of age or older who, in the absence of the owner, temporarily harbors, shelters, keeps or is in charge of a dog, cat or any other domesticated bird or animal.

6. CAT means a domesticated member of felis domestica.

7. COMMISSIONER means the commissioner of health, his or her designated representative within the health department, or any other city official to whom the commissioner's functions or duties under this chapter have been delegated pursuant to a memorandum of understanding.

8. COMMISSIONER OF PUBLIC WORKS means the legally designated head of the department of public works of the city of Milwaukee or his or her authorized representative.

9. DANGEROUS ANIMAL means:

a-1. Any animal which, when unprovoked, bites or otherwise inflicts bodily harm on a person, domestic pet or animal on public or private property.

a-2. Any animal which chases or approaches a person in a menacing fashion or apparent attitude of attack without provocation upon the streets, sidewalks or any public grounds or on private property without the permission of the owner or person in lawful control of the property.

a-3. An animal with a known propensity, tendency or disposition to attack, to cause injury to, or to otherwise threaten the safety of humans or other domestic pets or animals.

b. The biting or injury of a person by an animal shall in the absence of contrary evidence be presumed to be due to an unprovoked attack. Provocation of the animal by the person or animal that is bitten or injured or the fact that the animal bit or injured another person or animal as a result of provocation shall be considered in mitigation and if the provocation is purposeful or substantial, the court may accept the alleged bite or injury as self-defense by the animal and not classify the animal as dangerous.

c. An animal shall not be deemed a dangerous animal if it bites, attacks or menaces any person or animal to:

c-1. Defend its owner, caretaker or another person from an attack by a person or animal.

c-2. Protect its young or another animal.

c-3. Defend itself against any person or animal which has tormented, assaulted or abused it.

c-4. Defend its owner's or caretaker's property against trespassers.

9.5. DEPARTMENT means the health department or any department to which health department functions or duties under this chapter have been delegated pursuant to a memorandum of understanding.

10. DOG means a domesticated member of canis familiaris.

11. DOMESTICATED ANIMAL means any bird or animal of any species which usually lives in or about the habitation of humans as a pet or animal companion. The term does not include a dangerous animal or a prohibited dangerous animal.

12. DWELLING UNIT means one or more rooms, including a bathroom and kitchen facilities, which are arranged, designed or used as living quarters for one family or household.

13. FOWL means all domesticated birds and nondomesticated game birds ordinarily considered to be edible.

14. GROOMING means care or service provided to the exterior of an animal to change its looks or improve its comfort but does not mean the treatment of physical disease or deformities.

15. GROOMING ESTABLISHMENT means a business establishment in which a domesticated bird or animal is received for grooming.

16. KENNEL means a profit or nonprofit business establishment in which more than 3 dogs or 3 cats, or any combination thereof, over the age of 5 months may be kept for boarding, breeding, safekeeping, convalescence, humane disposal, placement, sale or sporting purposes.

17. MULTIPLE DWELLING means a commercial or residential building consisting of 3 or more dwelling units.

18. OWNER means any person owning, harboring, sheltering or keeping a dog, cat or any other domesticated bird or animal.

19. PERSON means any individual, firm, corporation or other legal entity.

20. PET SHOP means a business establishment, other than a kennel, where domesticated mammals, birds, fish or reptiles are kept for sale.

21. PIT BULL means any dog which is one-half or more American staffordshire terrier, staffordshire terrier, American pit bull terrier, miniature bull terrier or staffordshire bull terrier.

22. PROHIBITED DANGEROUS ANIMAL means:

a. Any animal that is determined to be a prohibited dangerous animal under s. 78-25.

b. Any animal that, while off the owner's or caretaker's property, has killed a domestic pet or animal without provocation.

c. Any animal that, without provocation, inflicts substantial bodily harm on a person on public or private property.

d. Any animal brought from another city, village, town or county that is described under s. 78-5-2-b.

e. Any dog that is subject to being destroyed under s. 174.02(3), Wis. Stats.

f. Any dog trained, owned or harbored for the purpose of dog fighting.

23. ROTTWEILER means any dog which is one-half or more rottweiler.

24. SUBSTANTIAL BODILY HARM means bodily injury that causes a laceration that requires stitches, any fracture of a bone, a concussion, a loss or fracture of a tooth or any temporary loss of consciousness, sight or hearing.

78-3. Owner or Caretaker's Duty; Presumption. 1. The owner or caretaker of any animal shall confine, restrain or maintain control over the animal so that the unprovoked animal does not attack or injure any person or domesticated animal.

2. The occupant of any premises on which a dog, cat or any other domesticated bird or animal remains or to which it customarily returns daily for a period of at least 10 days shall be presumed, for purposes of enforcement of this chapter, to be harboring, sheltering or keeping the animal.

78-5. Keeping of Animals Within City.

1. PERMITTED ANIMALS. No animal that is not a domesticated animal may be kept or brought into the city except as provided in s. 78-23 or as otherwise authorized by the commissioner.

2. CERTAIN ANIMALS PROHIBITED.

a. Except as otherwise provided in this chapter, no person shall keep within the city, either temporarily or permanently, any live bees, fowl, cows, cattle, horses, sheep, swine, goats, chickens, ducks, turkeys, geese or any other domesticated livestock, provided, however, that such animals or fowl may be kept at places approved by the commissioner for slaughtering, educational purposes, research purposes and for circuses or similar recreational events. Upon approval by the commissioner, horses used for livery service may be kept within the city. No rabbits or guinea pigs shall be kept within any portion of any multiple dwelling.

b. No person may bring into or keep in the city an animal that a Wisconsin city, village, town or county has declared dangerous or vicious, has banished from the city, village, town or county or has ordered to be destroyed. The commissioner may declare such an animal to be a prohibited dangerous animal in Milwaukee upon receipt of an official written declaration from the other city, village, town or county setting forth the grounds for the declaration, the name of the animal, if known, and the description of the animal.

c. No person may bring into or keep in the city, for sale or otherwise, either for food or for any other purposes whatsoever, any animal which, in accordance with the recommendations of the Compendium of Animal Rabies Control from the National Association of State Public Health Veterinarians, Inc., is not able to be effectively vaccinated against rabies, or any animal dead or alive, bird, insect, reptile or fish which is otherwise dangerous or detrimental to health.

3. NUMBER PERMITTED. No person may keep, harbor, shelter or possess at any time more than 3 dogs or cats or any combination thereof which are over the age of 5 months unless the person holds a valid animal fancier permit, kennel permit, pet shop permit or grooming establishment permit. The keeping of more than 3 dogs or cats over the age of 5 months per dwelling unit in a multiple dwelling is declared to be a nuisance. No person in a multiple dwelling shall be granted an animal fancier permit. There shall be no more than one animal fancier permit issued to any qualified dwelling unit.

4. ANIMAL REMOVAL. The department or the humane society may confiscate and remove animals from a premises for violation of subs. 1, 2 or 3 or ss. 78-23, 25 and 31. The department may convey such animals to the humane society to be housed and handled appropriately. If necessary, such animals may be disposed of in a humane manner by the department, humane society or their designee.

78-7. Kennels, Horse Stables and Animal Fancier Permits. 1. KENNELS AND HORSE STABLES. a. Permit Required. No person shall operate a kennel or horse stable without a valid permit issued by the commissioner. When all applicable provisions of this section along with applicable federal and state of Wisconsin requirements have been complied with by the applicant and a valid occupancy permit for this business has been issued by the commissioner of city development, the commissioner shall issue a permit to operate upon payment of the fee required in s. 60-51.

b. Kennels; Operation. Kennels shall be operated in accordance with the following requirements:

b-1. All animals shall be maintained in a healthy condition, or if ill shall be given appropriate treatment immediately.

b-2. The quarters in which the animals are kept shall be maintained in a clean condition and in a good state of repair.

b-3. Animal pens or enclosures shall be large enough to provide freedom of movement to the animals contained therein and shall be constructed of nonporous and noncorrosive materials. Dogs and cats over the age of 5 months shall be housed in separate

enclosures with enough space as set by applicable federal requirements with no more than 3 dogs or 3 cats contained within the same enclosure. Animals shall not have the freedom to roam the business establishment.

b-4. Food supplies shall be stored in rodent-proof containers and food and water containers shall be kept clean.

b-5. Litter or bedding material shall be changed as often as necessary to prevent an odor nuisance.

b-6. Feces shall be removed from yards, pens and enclosures at least daily and stored in tightly covered metal containers until final disposal.

b-7. Yards, pens, premises and animals shall be kept free of pest infestations.

b-8. No odor nuisance shall be permitted. Any animal holding area containing animals shall be provided with fresh air by means of windows, doors, vents, exhaust fans or air conditioning so as to minimize drafts, odors and moisture condensation.

b-9. Kennels shall also be operated in accordance with requirements set forth in s. 78-9-3 to 5. Nothing in this section shall apply where kennel services are incidental to the operation of a veterinary hospital.

c. Horse Stables; Operation. Horse stables shall, in addition to the requirements set forth in sub. b-1, 2, 4 to 8 and s. 78-5, be operated in accordance with the following:

c-1. Horse stalls or enclosures shall be large enough to provide freedom of movement to the animals contained therein and shall be constructed of such materials and in such a manner as to comply with all local, state and federal requirements.

c-2. Horses shall be stabled indoors.

c-3. The temperature of the stable shall comply with all local, state and federal animal welfare regulations.

c-4. An approved water supply shall be provided to all parts of the stable for the horses and to be used for wet cleaning.

c-5. Floor drains connected to an approved sewage system must also be provided.

2. ANIMAL FANCIER PERMITS.

a. The commissioner shall issue an animal fancier permit upon the payment of all applicable fees required in s. 60-3, provided that the owner has no outstanding violations under this chapter.

b-1. Whenever the department requests an inspection of the interior and exterior premises of a person holding an animal fancier permit or of an applicant for an animal fancier permit, the animal fancier or applicant shall schedule such an inspection and allow the inspection to be completed no later than 10 days after the date of the request. A request for a department inspection under this paragraph may be made by any of the following means:

b-1-a. An oral request delivered in person to the applicant or permit holder.

b-1-b. An oral request delivered by telephone to the applicant or permit holder.

b-1-c. A written request left at the residence or place of occupation of the applicant or permit holder.

b-1-d. A written request delivered to a competent adult occupant of the applicant's or permit holder's residence.

b-1-e. A written request addressed to the applicant or permit holder at his or her residence and mailed by first class, prepaid mail.

b-2. A person who fails to comply with an inspection request as required by this paragraph shall be charged a delayed inspection fee in the amount provided in s. 60-3-4.

c. A person holding an animal fancier permit shall conform to the requirements set forth in sub. 1-b-1 to 8.

d. An animal fancier permit may be revoked if an owner does not conform to the requirements set forth in sub. 1-b-1 to 8.

78-9. Pet Shops. 1. PERMIT REQUIRED. No person may operate a pet shop unless the person holds a valid permit issued by the commissioner. When all applicable provisions of this section have been complied with by the applicant and a valid occupancy permit for this type of business has been issued by the commissioner of city development, the commissioner shall issue a permit to operate a pet shop upon the payment of the fee required in s. 60-69.

2. OPERATION. Pet shops shall be operated in accordance with the requirements set forth in s. 78-7-1-b-1 to 8.

3. IMMUNIZATION. No pet shop may sell or offer for sale any dog or cat 5 or more months old unless the dog or cat has been vaccinated against rabies by use of a vaccine currently licensed by the U.S. department of agriculture. The vaccine shall be

administered by or under the supervision of a licensed veterinarian. A certificate of vaccination identifying the dog or cat including its approximate age, date of vaccination and signed by the vaccinating veterinarian shall be given the purchaser at the time of sale.

4. RECORD OF SALE. Every pet shop shall keep a record of every dog and cat sold by the establishment setting forth the date and source of acquisition, date of rabies vaccination, the date of sale and the name and address of the purchaser. Such records shall be maintained on the pet shop premises for at least one year following the date of sale of each dog and cat, and such records shall be open to inspection by the commissioner at all times during which the pet shop is open to the public.

5. SALE OF BATS, FOXES, RACCOONS AND SKUNKS PROHIBITED. No pet shop may engage in the purchase, keeping, distribution or sale of any species of bats, foxes, raccoons or skunks.

78-11. Grooming Establishments. 1. PERMIT REQUIRED. No person may operate a grooming establishment without a valid permit issued by the commissioner. When all applicable provisions of this section have been complied with by the applicant and a valid occupancy permit for this business has been issued by the commissioner of city development, the commissioner shall issue a permit to operate a grooming establishment upon the payment of the fee required in s. 60-43.

2. OPERATION. Animal grooming establishments shall, in addition to the requirements set forth in s. 78-7-1-b-2, 3 and 8, be operated in accordance with the following:

a. The floor of any room in which grooming operations are conducted or in which animals are kept shall be covered with an impervious, smooth, cleanable surface. The floors shall be cleaned and disinfected daily.

b. All animal hair and manure shall be removed from the floors daily and shall be stored in tightly covered, waterproof containers in such a manner as to prevent a nuisance until the final disposal.

c. In each grooming establishment that uses a bathtub, such bathtub shall be large enough to accommodate the largest animal groomed. The tub shall be made of approved material and shall be properly connected to an approved water system consisting of hot and cold running water and to an approved sewer or waste disposal system.

d. No animals shall be kept in any grooming establishment other than during regular office hours unless a valid kennel or pet shop permit is also issued for the same location. Nothing in this section shall apply to an establishment where grooming is incidental to the operation of a veterinary hospital.

e. The premises shall be kept free of insect and rodent infestation.

f. The premises shall be maintained and operated in a nuisance free manner.

78-13. Posting of Permit. Every kennel, pet shop or grooming establishment permit issued by the commissioner shall be posted in a conspicuous place open to the public.

78-15. Sanitary Conditions of Commercial Animal Establishment. All commercial kennels, hutches, runs, yards or any other commercial structures or premises where animals permitted to be kept in accordance with this chapter are housed or kept shall be maintained in a clean and sanitary condition.

78-17. Dog and Cat Licenses. 1. REQUIRED. Any person owning, keeping, harboring or having custody of any dog or cat over 5 months of age within the city of Milwaukee must obtain a license as provided in this section and in accordance with ch. 174, Wis. Stats., relating to dogs, and ch. 26, Milwaukee County Code of Ordinances, relating to cats. Any person obtaining a dog or cat that is older than 5 months of age shall have 30 days to apply for an original license, except this requirement will not apply to a nonresident keeping a dog or cat within the city for less than 30 days.

2. APPLICATION. Application for licenses shall be made to the city treasurer and shall include the name and address of the applicant, description of the animal, the appropriate fee, whether the animal is spayed or neutered and a rabies certificate or tag issued by a licensed veterinarian illustrating that the animal for which the license is sought has received current immunization for rabies or a statement issued by a licensed veterinarian that the immunization for rabies is contraindicated for the animal. A rabies certificate or tag shall be deemed valid if the termination date of the immunization falls after the date of the application for the license. Written proof is required from a licensed veterinarian that the animal being licensed has been spayed or neutered in order to qualify for a reduced license fee.

3. FEES. A license shall be issued after payment of the fee specified in s. 60-7.

4. PAYMENT RESPONSIBILITY. The owner, harborer, shelterer or head of the family shall be liable for payment of the license fee of any dog or cat owned, harbored or kept by any member of the family.

5. ISSUANCE. Upon acceptance of the license application and fee, the city treasurer shall issue a tag and a license. The tag shall be securely attached by the licensee to a collar or harness and the collar or harness with the tag attached shall be kept on the dog or cat for which the license is issued at all times. This requirement does not apply to a dog or cat securely confined indoors or in a fenced area.

78-19. Animals at Large; Animal Litter Nuisance. 1. UNLAWFUL. No owner or caretaker of any animal may permit or suffer the animal to be at large. Any animal found at large shall be deemed to be so with the permission or at the sufferance of its owner or caretaker. Any adult person alone or together with other adults may seek relief from animals at large by a complaint to the commissioner setting forth the specific date and approximate time an animal of a particular owner was observed by them to be at large. The commissioner shall notify the owner or caretaker of the animal, in writing, of the alleged violation and provisions of this section. If the petitioners subsequently observe that the animal is again at large, they may submit a written petition to the city attorney for commencement of prosecution to obtain compliance with this section. Such written petition shall contain:

a. Name and address of complainant.

b. Description of animal and address of owner.

c. Dates and times violations were noted.

d. Date reported to commissioner.

e. Statement that petitioners will be willing to sign complaint and testify in court.

2. SETTING AT LARGE. No person may permit an animal to run at large by opening any door or gate of any premises or loosen any restraining device or otherwise entice any animal to leave any place of confinement.

3. ANIMAL LITTER NUISANCE. No owner or caretaker of any animal may appear with the animal on any street, alley, sidewalk, lawn, field or any public property or upon a property other than their own without a shovel, scoop, bag or other items for the removal of fecal matter. The owner or caretaker of an animal shall immediately after deposit of fecal matter on such premises remove all fecal matter by shovel, scoop, bag or other item and properly wrap and deposit the fecal matter in an approved waste container as specified in s. 79-4 situated upon his or her own premises.

4. COMPLAINTS. Any adult person alone or together with other adults may seek relief from animal fecal matter deposits as described in sub. 3 by a complaint to the commissioner in the same manner and procedure as set forth in sub. 1.

78-21. Impounding of Animals.

1. IMPOUNDING. Any police officer or humane officer finding an animal at large may seize the animal and impound it in the place designated by the commissioner. The commissioner may also cause the seizure and impoundment of animals at large.

2. REPOSSESSION. The possession of any animal so seized or impounded may be obtained by the owner upon payment of the fee required in s. 60-5 plus the current daily fee for keeping such animal for each calendar day or fraction thereof during which the animal has been impounded. The possession of an unlicensed dog or cat may be obtained by the owner after he or she obtains the required license and pays the specified impoundment and daily fee for keeping the dog or cat.

78-22. Pit-Bull and Rottweiler Dogs.

1. OWNER RESPONSIBILITIES. The owner of any pit bull dog, as defined in s. 78-1-21 or any rottweiler dog, as defined in s. 78-1-23 shall comply with all of the following:

a. While leashed, the leash shall be held by a person 16 years of age or older, who is competent to govern the animal. The leash may be held by a person younger than 16 years of age upon prior written approval of the department of neighborhood services or when shown in a sanctioned American Kennel Club show or other organized competition among trained owners and dogs. The written approval shall be carried by the person younger than age 16.

b. Have a fenced yard or kennel area which is of a height sufficient to contain the dog and is a minimum of 3 feet from any public street, sidewalk or alley. The fencing material shall be of a material which cannot be climbed by a dog and be set a minimum of 12 inches into the ground. The kennel area shall have a concrete floor.

c. Attend a minimum of one dog behavior or training class per year offered by a trainer recommended by the Wisconsin Humane Society, the Milwaukee Dog Training Club or the Cudahy Kennel Club.

2. AT LARGE. No pit bull or rottweiler dog shall be at large, in violation of s. 78-19-1 or 2.

3. DEFENSE. The owner shall be responsible for presenting proof of a dog's breeding as a defense for failure to comply with the section.

78-23. Harboring Dangerous Animals.

1. DANGEROUS ANIMALS REGULATED. a. No person may harbor or keep a dangerous animal within the city unless all provisions of this section are complied with. Any animal that is determined to be a prohibited dangerous animal under s. 78-25-2 shall not be kept or harbored in the city.

b. The commissioner may determine an animal to be a dangerous animal whenever the commissioner finds that an animal meets the definition of a dangerous animal in s.78-1-9.

c. The issuance of a citation for a violation of this section need not necessarily be predicated on a determination by the commissioner that an animal is a dangerous animal.

2. LEASH AND MUZZLE. No person owning, harboring or having the care of a dangerous animal may permit such animal to go outside its kennel or pen unless the animal is securely leashed with a leash no longer than 4 feet in length. No person may permit a dangerous animal to be kept on a chain, rope or other type of leash outside its kennel or pen unless a person who is 16 years of age or older, competent to govern the animal and capable of physically controlling and restraining the animal is in physical control of the leash. The animal may not be leashed to inanimate objects such as trees, posts and buildings. A dangerous animal on a leash outside the animal's kennel shall be muzzled in a humane way by a muzzling device sufficient to prevent the animal from biting persons or other animals. A dangerous animal shall not be required to be muzzled upon prior written approval of the health department or when shown in a sanctioned American Kennel Club show. The written approval shall be carried by the owner or caretaker.

3. CONFINEMENT. a. Except when leashed and muzzled as provided in sub. 2, all dangerous animals shall be securely confined indoors or in a securely enclosed and locked pen or kennel that is located on the premises of the owner or caretaker and constructed in a manner that does not allow the animal to exit the pen or kennel on its own volition.

b. When constructed in an open yard, the pen or kennel shall, at a minimum, be constructed to conform to the requirements of this paragraph. The pen or kennel shall be child-proof from the outside and animal-proof from the inside. A strong metal double fence with adequate space between fences (at least 2 feet) shall be provided so that a child cannot reach into the animal enclosure. The pen, kennel or structure shall have secure sides and a secure top attached to all sides. A structure used to confine a dangerous animal shall be locked with a key or combination lock when the animal is within the structure. The structure shall either have a secure bottom or floor attached to the sides of the pen or the sides of the pen shall be embedded in the ground no less than 2 feet. All structures erected to house dangerous animals shall comply with all city zoning and building regulations. All structures shall be adequately lighted and ventilated and kept in a clean and sanitary condition.

4. CONFINEMENT INDOORS. No dangerous animal may be kept on a porch, patio or in any part of a house or structure on the premises of the owner or caretaker that would allow the animal to exit the building on its own volition. No dangerous animal may be kept in a house or structure when the windows are open or when screen windows or screen doors are the only obstacle preventing the animal from exiting the structure.

5. SIGNS. The owner or caretaker of a dangerous animal shall display, in prominent places on his or her premises near all entrances to the premises, signs in letters of not less than

2 inches high warning that there is a dangerous animal on the property. A similar sign is required to be posted on the kennel or pen of the animal. In addition, the owner or caretaker shall conspicuously display a sign with a symbol warning children of the presence of a dangerous animal.

6. SPAY AND NEUTER REQUIREMENT. Within 30 days after an animal has been designated dangerous, the owner or caretaker of the animal shall provide written proof from a licensed veterinarian that the animal has been spayed or neutered.

7. LIABILITY INSURANCE. The owner or caretaker of a dangerous animal shall present to the department or police department proof that the owner or caretaker has procured liability insurance in an amount not less than $1,000,000 for any personal injuries inflicted by the dangerous animal. Whenever such a policy is cancelled or not renewed, the insurer shall so notify the department.

8. WAIVER BY COMMISSIONER. Upon request, the commissioner may waive any requirement specified in subs. 2 to 7 that the commissioner deems to be inappropriate for a particular dangerous animal.

9. APPEAL. Upon investigation, a department or humane officer may issue an order declaring an animal to be a dangerous animal. Whenever an owner or caretaker wishes to contest an order, he or she shall, within 72 hours after receipt of the order, deliver to the department a written objection to the order. If an owner or caretaker makes such an objection to the order, the department shall convene a hearing before a dangerous animal panel. The procedure for such appeal and the composition of the panel shall all be as specified ins. 78-25.

10. NOTIFICATION. The owner or caretaker shall notify the department or police department within 24 hours if a dangerous animal is at large, is unconfined, has attacked another animal or has attacked a human being, has died, has been sold or has been given away. If the dangerous animal has been sold or given away, the owner or caretaker shall also provide the department or police department with the name, address and telephone number of the new owner of the dangerous animal. If the dangerous animal is sold or given away to a person residing outside the city, the owner or caretaker shall present evidence to the department or police department showing that he or she has notified the police department or other law enforcement agency of the animal's new residence, including the name, address and telephone number of the new owner of the dangerous animal.

11. EUTHANASIA. If the owner or caretaker of an animal that has been designated a dangerous animal is unwilling or unable to comply with the regulations for keeping the animal in accordance with this section, he or she may have the animal humanely euthanized by an animal shelter, the humane society or a licensed veterinarian.

12. WAIVER. The commissioner may waive the provisions of subs. 2 to 7 for a law enforcement or military animal upon presentation by the animal's owner or handler of a satisfactory arrangement for safe keeping of the animal.

78-25. Prohibited Dangerous Animals.

1. NOT ALLOWED IN CITY. No person may bring into or keep in the city any animal that is a prohibited dangerous animal under this section.

2. DETERMINATION OF A PROHIBITED DANGEROUS ANIMAL. a. The commissioner may determine an animal to be a prohibited dangerous animal whenever the commissioner finds that an animal meets the definition of a prohibited dangerous animal in s. 78-1-22 or is a dangerous animal in non-compliance with any of the provisions of s. 78-23.

b. Upon investigation, a department or humane officer may issue an order declaring an animal to be a prohibited dangerous animal. Whenever an owner or caretaker wishes to contest an order, he or she shall, within 72 hours after receipt of the order, deliver to the department a written objection to the order. The written objection shall include the specific reasons for objecting to or contesting the order. If an owner or caretaker makes such an objection to the order, the department shall convene a hearing. The hearing shall be conducted before a 3-person dangerous animal panel composed of a representative of the city clerk's office who works in community services, to be designated by the city clerk, a humane officer or his or her designee and a veterinarian selected by the Milwaukee County veterinary society. Each panel member serves

as an officer of the city exercising a quasi-judicial function within the scope of s. 893.80, Wis. Stats. At the hearing, the owner or caretaker shall have the opportunity to present evidence as to why the animal should not be declared a prohibited dangerous animal. The hearing shall be held promptly and within no less than 5 days nor more than 10 days after service of a notice of hearing upon the owner or caretaker of the animal.

c. Pending the outcome of the hearing, the animal must be securely confined in a humane manner either on the premises of the owner or caretaker or with a licensed veterinarian. The commissioner may order impoundment of the animal pending the result of the hearing.

d. After the hearing, the owner or caretaker shall be notified in writing of the panel's determination. If a determination is made that the animal is a prohibited dangerous animal, the owner or caretaker shall comply with sub. 1 in accordance with a time schedule established by the commissioner or chief of police, but in no case more than 30 days after the date of the determination. If the owner or caretaker further contests the determination, he or she may, within 5 days of receiving the panel's decision, appeal the decision to the administrative review appeals board.

3. DESTRUCTION. Any dog that has caused bodily harm to a person or persons on 2 separate occasions off the owner's premises, without reasonable cause, may be destroyed as a result of judgment rendered by a court of competent jurisdiction, as specified under s. 174.02(3), Wis. Stats. The city attorney may petition an appropriate court to obtain a court order to destroy such a dog.

4. ENFORCEMENT. The department and police department may make whatever inquiry is deemed necessary to ensure compliance with this section.

5. WAIVER. The commissioner may waive the provisions of this section for a law enforcement or military animal upon presentation by the animal's owner or handler of a satisfactory arrangement for safe keeping of the animal.

78-27. Control of Rabid Animals. 1. The owner of any animal which has contracted rabies or which has been exposed to rabies or which is suspected of having rabies or which has bitten any person and is capable of transmitting rabies shall upon demand of the police department or commissioner produce and surrender the animal to the police department or commissioner to be held in quarantine in a place designated by the commissioner for observation for a period of time determined by the commissioner.

2.a. If, upon investigation by the commissioner an animal other than a dog or cat has bitten a person or appears to be infected with rabies, the animal may be destroyed as directed by the commissioner, in accordance with s. 95.21(4)(b), Wis. Stats.

b. If, upon investigation by the commissioner and a determination by a veterinarian that a dog or cat exhibits symptoms of rabies, the dog or cat may be destroyed as directed by the commissioner, who shall act in accordance with s. 95.21(5)(d), Wis. Stats.

3. No person may knowingly harbor or keep any animal infected with rabies or any animal known to have been bitten by a rabid animal.

78-29. Animals; Disturbing the Peace.

1. COMPLAINTS. No person may own, keep, have in his or her possession or harbor any bird or animal which by frequent and habitual howling, yelping, barking or otherwise shall cause serious annoyance or disturbance to persons in the neighborhood. No prosecution may be commenced except upon the request of the commissioner following written complaint signed by one or more affected adult persons. No persons may be convicted under the provisions of this section except upon testimony of one or more adult persons.

2. CITATIONS. Notwithstanding sub. 1, enforcement personnel from the department and the police department may utilize a citation to help obtain relief from animal annoyances. In such instances, a notice shall be issued to the owner or caretaker of the animal producing the alleged nuisance specified by the complainant. Following issuance of such notice and where subsequent complaints are received of an alleged continued nuisance, the designated enforcement agencies may attempt to verify the reported animal nuisance. Where such verification is accomplished, these enforcement personnel may issue or cause to be issued a citation in accordance with other provisions of this chapter on the owner or caretaker of the animal causing the disturbance.

78-31. Cruelty to Animals. 1. CRUELTY. a. No person may cause, allow or personally beat, frighten, overburden or abuse any animal or bird, or use any device or chemical substance by which pain, suffering or death may result, whether the animal belongs to the person or another, except that reasonable force may be used to drive off dangerous or trespassing animals.

b. No person shall abandon or transport any animal or bird in a cruel manner.

2. FOOD AND WATER. No person owning or having custody of any animal or bird may neglect or fail to provide it with necessary nourishing food at least once daily and provide a constant supply of clean water to sustain the animal or bird in good health.

3. SHELTER. a. No person may fail to provide any animal or bird in his or her charge with shelter from inclement weather to insure the protection and comfort of the animal or bird.

b. When sunlight is likely to cause overheating or discomfort to any animal or bird, shade shall be provided by natural or artificial means to allow protection from the direct rays of the sun.

c. Dogs and cats kept outdoors for more than one hour at a time shall be provided with moistureproof and windproof shelter of a size which allows the animal to turn around freely and to easily sit, stand and lie in a normal position and to keep the animal clean, dry and comfortable. Whenever the outdoor temperature is below 40° F, clean, dry bedding material in quantity and type approved by a duly appointed humane society officer shall be provided in such shelters for insulation and to retain the body heat of the animal. Automobiles shall not be used as animal shelters.

4. LEASHES. Chains, ropes or leashes shall be placed or attached so that they cannot be entangled with another animal or object and shall be of sufficient length in proportion to the size of the animal to allow the animal proper exercise and convenient access to food, water and shelter. A leash shall be located so as not to allow an animal to trespass on public or private property nor in such a manner as to cause harm or danger to persons or other animals.

5. ANIMAL FIGHTING. a. Instigation. No owner or caretaker of any animal shall cause or allow any animal to lunge at, or fight any other animal or person.

b. Veterinary care. No owner of caretaker of any animal which has attacked or fought with another animal or person shall fail to get prompt veterinary care for the animal if the animal is bleeding or injured, and shall provide a copy of a current dog license upon request.

78-33. Nuisance Birds. Starlings, English sparrows and feral pigeons are declared a public nuisance and may be trapped or destroyed under the supervision of the commissioner subject to applicable federal and state regulations.

78-35. Bird Feeding. Feed for birds shall be placed in a covered hopper, gravity type feeder. The platform of the feeders shall be of reasonable size and surrounded by a ledge to deter food from blowing off. The feeder shall be placed on top of a rodent-proof pole which extends at least 3.5 feet above the ground and shall be placed at least 6 feet from the nearest climbable object, or the feeder may be suspended from a tree if protected by rodent guards. Feed for birds shall not be placed on the ground where it is accessible to rodents. No more than 4 bird feeders shall be located on any premises.

78-37. Pigeon Harborages. Whenever the owner or tenant of any property in the vicinity of a premises upon which there are pigeon harborages makes a complaint to the department of a feral pigeon nuisance and if a pigeon nuisance is found to exist, the commissioner shall order the owner or manager of the premises to make the premises reasonably pigeon-proof and when necessary cover openings with hardware cloth or other suitable material for preventing pigeons from entering in or upon the premises.

78-39. Selling Baby Fowls. No person may display, give away or sell baby chicks or ducklings or any other young of domestic or nondomestic fowl as pets or novelties.

78-41. Stuffed Animals; Preservatives. No person may sell dead, stuffed birds or animals as novelties which have been preserved with arsenic or any other substance toxic to humans.

78-43. Turtles. No person may sell live turtles with a carapace length of less than 4 inches as pets or novelties.

78-45. Giving Away Animals as Prizes. No person may raffle or give as a prize or premium any live animal.

78-47. Display of Birds in Food Establishments. No person may display birds of the psittacine family in any store selling, giving away or preparing food or drink for human consumption unless the birds are so enclosed as to prevent any possible contamination of the food or drink.

78-49. Removal of Dead Animals. Any person owning or having charge or control of any dead animal except those intended for food purposes shall remove the same from the city within 12 hours after the time of the death of the animal or shall request the commissioner of public works to remove and dispose of the animal. Any person who fails to do so shall relinquish all rights to any such animal and the commissioner may order the animal removed after the expiration of such time.

78-51. Disposal of Dead Animals and Condemned Meat Products. The commissioner of public works shall collect and dispose of all dead animals reported or found within the city, any fish, poultry or meat products which may be condemned by and ordered removed by the commissioner, and dead fish harvested by the harbor commission. Such collection and disposal may be provided by representatives of the commissioner of public works, or the commissioner of public works may cause the collection and disposal by private contractor. All collection and disposal shall be undertaken within 12 hours of notice and in a safe and sanitary manner satisfactory to the commissioner.

78-53. Conveyance of Dead Animals.

1. PARKING. No person may cause or allow any means of conveyance, including railway cars, used for the transport of dead animals, whether filled or partially filled, to remain at any point within the city for a period longer than 24 hours. No odor nuisance may be created by such parking.

2. SANITARY CONDITION. No person may cause or allow any conveyance or vehicle which is used for the transport of dead or live animals when the same is not in use to be stored or kept on any premises in the city unless the conveyance or vehicle has been cleaned, disinfected and deodorized or as may otherwise may be directed by the commissioner.

3. CONSTRUCTION. No person may use or cause to be used any conveyance or vehicle to carry or hold dead animals or animal refuse in the city, unless the conveyance or vehicle has watertight floors and sides and unless the conveyance or vehicle is constructed and arranged to shield its contents from view and prevent leakage or loss of contents or escape of odors.

78-55. Penalties and Enforcement.

1. BY ORDER. a. Whenever any violation of this chapter is found, the commissioner may issue a written order setting forth the character of the violation. This order may be served in any of the following ways:

a-1. Personally.

a-2. By posting in a conspicuous location on the premises where an animal is kept.

a-3. By mailing with an affidavit of the same to the operator of the establishment or place, or to a person responsible for a violation at his or her last known address.

a-4. By leaving a copy at his or her usual place of business with a responsible employe, or his or her usual place of abode in the presence of some competent member of the family at least 14 years of age, which employe or family member shall be informed of the contents of the order.

b. The order shall direct the person to correct such practices or conditions within a reasonable period of time to be determined by the commissioner. The order shall also state the potential legal or enforcement consequences if such practices or conditions have not been corrected within that period of time.

2. SUSPENSION OR REVOCATION OF PERMITS. a. Suspension. If at the end of a period of time set forth in an order, a reinspection by the commissioner reveals that the practices or conditions have not been corrected and such practices or conditions pose a potential threat to the health of persons exposed, the commissioner may notify the operator of the business or place of the commissioner's intent to suspend the permit and give such notice in writing to the operator and also the operator's right to a hearing and the request procedure. When the commissioner determines that existing conditions and violations pose an imminent and immediate and dangerous threat to the health of persons exposed to such conditions, the commissioner may order immediate suspension of a permit by written notification along with instructions on

the hearing procedure for review of such an action.

b. Revocation. The commissioner may serve written notice to an operator of the commissioner's intent to revoke a permit issued pursuant to this chapter and shall notify the operator of his or her right to a hearing prior to the action and the process for appeal. Grounds for the commissioner's intent to revoke a permit shall include any of the following:

b-1. The operator has a record of excessive, continuing or recurring violations.

b-2. The violations pose an immediate threat to the public's health or an imminent danger to other animals in the community and unsatisfactory action has been taken by the operator to eliminate the conditions.

b-3. A permit issued pursuant to this chapter has been suspended, and the corrections necessary for reinstatement of the permit have not been made within 6 months following notice of the suspension.

b-4. The operator or persons representing the operator have interfered with the lawful inspection or enforcement activities of the commissioner concerning the place of permit by physical abuse or denial of entry.

3. HEARING. Any person whose permit to operate an establishment or place regulated under this chapter has been suspended, or who has received notice from the commissioner that the permit is to be suspended unless existing conditions or practices at the establishment are corrected, or that the permit is to be revoked, may request and shall be granted a hearing on the matter before the commissioner. If no written petition for a hearing is filed in the office of the commissioner within 15 days following the day on which the notice was mailed or delivered, the permit shall be deemed to have been automatically suspended or revoked. Upon receipt of notice of permit suspension or revocation, the operator shall cease to operate the establishment. Upon receipt of petition for a hearing, the commissioner shall within 10 days notify the petitioner of the date, time and place of the hearing. Following the hearing the commissioner shall modify or withdraw the notice of permit suspension or revocation or shall suspend or revoke the permit, as in the commissioner's judgment is necessary to protect the public health, safety and welfare of the citizens of Milwaukee and shall notify the petitioner in writing of the decision.

4. APPEALS. Decisions of the commissioner may be appealed to the administrative review appeals board.

5. CITATIONS. The police department may issue citations for any violation of this chapter except that the police department may not determine an animal to be a prohibited dangerous animal under s. 78-25.

6. VIOLATIONS OF CERTAIN REGULATIONS. a. Any person violating any of the following provisions of this chapter listed in Column A for which specific penalties are not provided elsewhere in this subsection shall be liable on conviction to the penalties listed in column B and described in ch. 61:

A	B
78-3-1	Class I
78-5-1	Class F
78-5-2-a	Class C
78-5-2-b	Class L
78-5-2-c	Class F
78-5-3	Class C
78-7 to 78-19	Class C
78-22	Class F
78-23-1 to 78-23-7	Class F
78-23-10	Class I
78-25-1	Class K
78-27 to 31	Class F
78-35 to 47	Class C
78-49	Class F
78-53	Class F

b. b-1. Any person who commits a second or subsequent violation of s. 78-19-1 or who commits a second or subsequent violation of an order issued under s. 78-19-1 shall be liable upon conviction to a Class D penalty under ch. 61.

b-2. Any person who commits a first violation of s. 78-23-2, 78-23-3 or 78-23-4, or who commits a first violation of an order issued under s. 78-23-2, 78-23-3 or 78-23-4 that results in a dangerous animal being at large, shall be liable upon conviction to a Class I penalty under ch. 61.

b-3. Any person who commits a second or subsequent violation of s. 78-23-2, 78-23-3 or 78-23-4, or who commits a second or subsequent violation of an order issued under s. 78-23-2, 78-23-3 or 78-23-4 that results in a dangerous animal being at large, shall be liable upon conviction to a Class L penalty under ch. 61.

b-4. Any person who commits a violation of s. 78-23-1 that results in a dangerous animal causing bodily harm to a person shall be liable upon conviction to a Class L penalty under ch. 61.

b-5. Any person who commits a second or subsequent violation of s. 78-25-1 or who commits a second or subsequent violation of an order issued under s. 78-25-1 shall be liable upon conviction to a Class L penalty under ch. 61, each day of violation or noncompliance being a separate violation.

c. If a person continues in violation of an order, the person shall be liable for further prosecution, conviction and punishment upon the same order without the necessity of the commissioner issuing a new order.

7. CITATIONS. a. Citations may be issued for all violations listed in sub. 6 with or without a prior order or notice.

b. The stipulation, forfeiture and court procedure as set forth in s. 50-25 shall apply.

LEGISLATIVE HISTORY
CHAPTER 78

Abbreviations:
am = amended ra = renumbered and amended rn = renumbered
cr = created rc = repealed and recreated rp = repealed

Section	Action	File	Passed	Effective
Ch. 78	rc	85-1880	4/15/86	5/1/86
Ch. 78	rc	960684	9/24/96	10/11/96
78-1-2	am	980963	12/18/98	1/1/99
78-1-4-a	am	870882	5/16/89	6/3/89
78-1-7	rc	980963	12/18/98	1/1/99
78-1-8.5	cr	870882	5/16/89	6/3/89
78-1-9.5	cr	980963	12/18/98	1/1/99
78-1-12.5	cr	891875	2/27/90	3/21/90
78-1-19	am	871478	12/8/87	1/1/88
78-1-20	cr	870882	5/16/89	6/3/89
78-1-21	rn to 78-1-22	010558	1/22/2002	2/5/2002
78-1-21	cr	010558	1/22/2002	2/5/2002
78-1-22	rn to 78-1-24	010558	1/22/2002	2/5/2002
78-1-23	cr	010558	1/22/2002	2/5/2002
78-2-1	am	872295	3/8/88	3/25/88
78-2-2	am	940400	6/28/94	7/16/94
78-2-4	am	870882	5/16/89	6/3/89
78-3-1-a	am	872295	3/8/88	3/25/88
78-3-1-a	am	881803	1/24/89	2/11/89
78-3-1-b (title)	am	872295	3/8/88	3/25/88
78-3-1-c	cr	872295	3/8/88	3/25/88
78-3-2-a	am	881803	1/24/89	2/11/89
78-3-2-a	rc	951646	3/5/96	3/22/96
78-3-2-b	rn to 78-3-2-c	951646	3/5/96	3/22/96
78-3-2-b	cr	951646	3/5/96	3/22/96
78-4-1	am	881803	1/24/89	2/11/89
78-5-1	am	881803	1/24/89	2/11/89
78-5-1	am	980963	12/18/98	1/1/99
78-5-2-a	am	980963	12/18/98	1/1/99
78-5-2-c	am	961654	3/4/97	3/20/97
78-5-4	am	980963	12/18/98	1/1/99
78-7-1-a	am	980963	12/18/98	1/1/99
78-7-2-a	am	980963	12/18/98	1/1/99
78-7-2-b-1-0	am	980963	12/18/98	1/1/99
78-7-2-c	rc	970562	7/25/97	8/13/97
78-7-2-d	cr	970562	7/25/97	8/13/97
78-8-3	am	881803	1/24/89	2/11/89
78-9-1	am	980963	12/18/98	1/1/99
78-9-4	am	980963	12/18/98	1/1/99
78-10-2	am	881803	1/24/89	2/11/89
78-11-1	am	980963	12/18/98	1/1/99
78-11-5	am	921354	12/18/92	1/12/93
78-11-5	am	931716	3/8/94	3/25/94
78-11.4	cr	870882	5/16/89	6/3/89
78-11.5	cr	870882	5/16/89	6/3/89
78-11.5-11	rn	891875	2/27/90	3/21/90
78-11.5-11-b	cr	891875	2/27/90	3/21/90
78-13	am	980963	12/18/98	1/1/99

78-19-1-0	am	980963	12/18/98	1/1/99
78-19-1-d	am	980963	12/18/98	1/1/99
78-19-4	am	980963	12/18/98	1/1/99
78-20-5	cr	881114	10/11/88	10/21/88
78-21-1	am	980963	12/18/98	1/1/99
78-22	cr	010558	1/22/2002	2/5/2002
78-23-1	rc	961654	3/4/97	3/20/97
78-23-1-c	cr	971256	12/16/97	1/8/98
78-23-2	am	010558	1/22/2002	2/5/2002
78-23-7	am	980963	12/18/98	1/1/99
78-23-9	rc	961654	3/4/97	3/20/97
78-23-9	am	980963	12/18/98	1/1/99
78-23-10	am	980963	12/18/98	1/1/99
78-23-12	am	980963	12/18/98	1/1/99
78-25-2-b	rc	961654	3/4/97	3/20/97
78-25-2-b	am	980963	12/18/98	1/1/99
78-25-2-b	am	981371	1/19/99	2/5/99
78-25-2-d	am	980963	12/18/98	1/1/99
78-25-4	am	980963	12/18/98	1/1/99
78-25-5	am	980963	12/18/98	1/1/99
78-27-1	am	980963	12/18/98	1/1/99
78-27-2	rc	970122	5/13/97	5/31/97
78-27-2	am	980963	12/18/98	1/1/99
78-28-1-a	am	870882	5/16/89	6/3/89
78-28-2-b	am	881930	3/7/89	3/25/89
78-29-1	am	980963	12/18/98	1/1/99
78-29-2	am	980963	12/18/98	1/1/99
78-31-5	rp	980963	12/18/98	1/1/99
78-31-5	cr	010558	1/22/2002	2/5/2002
78-33	am	980963	12/18/98	1/1/99
78-37	am	980963	12/18/98	1/1/99
78-49	am	980963	12/18/98	1/1/99
78-51	am	980963	12/18/98	1/1/99
78-53-2	am	980963	12/18/98	1/1/99
78-55-1	rc	961654	3/4/97	3/20/97
78-55-1-a-0	am	980963	12/18/98	1/1/99
78-55-3	am	980963	12/18/98	1/1/99
78-56-6-a	am	010558	1/22/2002	2/5/2002

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CHAPTER 22
POLICE AND FIRE DEPARTMENTS

TABLE

22-03. Police Force. 1. The police force of every city of the first class, however incorporated, shall consist of one chief of police, one inspector, one captain of detectives, and such number of captains of police, lieutenants, detectives, sergeants, roundsmen, patrolmen and other members as the common council shall from time to time by ordinance determine and prescribe.

2. In addition to the positions enumerated in sub. 1, the police force of the city of Milwaukee shall consist of and include the following positions, the number of which shall be determined by the salaries and positions ordinance:

a. Administrative assistants.
b. Deputy inspectors of police
c. Garage supervisor, assistant.
d. Garage supervisor, police.
e. Handwriting technician.
f. Jail matron.
g. Police alarm, assistant chief operator.
h. Police alarm, chief operator of.
i. Police communications, assistant superintendent of.
j. Police communications, superintendent of.
k. Police identification, superintendent.
l. Police identification, supervisor.
m. Police identification, technicians.
n. Police property and stores, custodian of.
o. Police property and stores, assistant custodian of.
p. Policewomen.
q. Radio mechanics.
r. Secretary of police department.
s. Traffic accident investigator.

3. All other positions in the police department shall constitute and be considered as civilian employe division of the police department without police powers.

4. All members or employes of the police department who are not members or employes of the police force shall be known as civilian employes or members of the police department.

5. All members or employes of the police force of the police department shall be known as police officers. *(S. 1, Ch. Ord. 150, Apr. 25, 1949.)*

22-04. Witness Fees. Any and all witness fees paid to any member or employe of the police department of the city of Milwaukee for attendance or testifying in any court where the information or knowledge testified to or sought to be elicited has been acquired by said member or employe of the police department in the performance of his official duty or employment, shall be immediately paid over by said member or employe to the chief of police who in turn shall pay over such witness fees to the city treasurer. All such witness fees received by the city treasurer shall be credited to the general city fund. *(S. 3, Ch. Ord. 49, Nov. 16, 1931.)*

22-05. Police Detail. The mayor or common council may direct the chief of police to detail any of the policemen to perform such official duties as he or they deem proper, and no extra compensation shall be allowed therefor. *(S. 3, Subch. 15, Ch. 184, L. 1874.)*

22-06. Rewards. Any and all property, money, gifts or things of value, other than salaries, received by the police department of the city of Milwaukee, or by any member or employe thereof, as reward or compensation in the

performance of official duties or special services in said department, shall become the property of the city of Milwaukee. All money so received or realized from any property so received shall be paid over by the chief of police to the city treasurer and all money so received by the city treasurer shall be credited to the general city fund. *(S. 3, Ch. Ord. 52, Jan. 25, 1932.)*

22-07. Police Powers of City Officers. The mayor, the harbor master and bridge tenders of the city, and the commissioner of health and his assistants, the meat inspector, and the special assistants appointed by said commissioner of health for quarantine service while engaged in such service, shall severally and respectively have and exercise, within said city, all the powers of policemen of said city, and the powers granted to the above mentioned shall be without any compensation or claim to compensation therefor. *(Am. Ch. Ord. 543, File #84-948, Nov. 13, 1984.)*

22-08. Police; Powers and Duties. The members of the police force shall perform such duties as shall be prescribed by the common council for the preservation of the public peace, and the good order and health of the city; they shall possess the powers of constables at common law; and all powers given to constables by the law of this state. The chief and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables; shall arrest with or without process and with reasonable diligence take before a magistrate or other proper court every person found in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city, and may within the county of Milwaukee execute all process issued by the courts of said county in criminal cases, but shall not serve civil process except when the city is a party. *(S. 26, Ch. Ord. 323, Oct. 21, 1966.)*

22-09. Authority Within the County. 1. EXTENDED. The authority of the police department of the city of Milwaukee, is hereby extended so as to embrace the county of Milwaukee, and policemen of said city shall have the like authority to make arrests and serve process within the county of Milwaukee as are now possessed by them within the city of Milwaukee.

2. BY MILWAUKEE COUNTY. In order to facilitate the transactions of business and performance of duty by policemen in the county of Milwaukee, beyond the limits of the city of Milwaukee, the county board of supervisors of the county of Milwaukee may supply the police department of the city of Milwaukee with sufficient authority and conveyance to travel through the county of Milwaukee. *(S. 1, 2, Ch. 204, L. 1875.)*

3. SERVICE AND RETURN OF PROCESS. The officers and members of the police force shall have authority to serve and return process returnable in any court in the county of Milwaukee, in cases in which the city of Milwaukee or the state of Wisconsin is plaintiff or prosecutor, with the same force and effect as the same may be done by the sheriff of said county or his deputies. *(S. 5, Ch. 308, L. 1882.)*

4. OFFICERS OF THE PEACE; PENALTY FOR DISOBEYING. The mayor or acting mayor, the sheriff of Milwaukee county, and each justice of the peace, policeman, constable and watchman, shall be officers of the peace and may command the peace, and suppress in a summary manner all rioting and disorderly behavior within the limits of the city; and for such purposes they may command the assistance of all bystanders, and, if need be, of all citizens and military companies; and if any person, bystander, military officer, or private, shall refuse to aid in maintaining the peace when so required each such person shall forfeit and pay a fine of fifty dollars and in cases where the civil power may be required to suppress riotous and disorderly behavior, the superior or senior officer present, in the order above mentioned in this section, shall direct the proceedings. *(S. 6, Subch. 15, Ch. 184, L. 1874, as affected by 1983 Wisconsin Act 210.)*

22-10. Charges Against Subordinates. 1. Charges may be filed against a subordinate by the chief, by a member of the fire and police commission, by the board as a body, or by an elector of the city. Such charges shall be in writing and shall be filed by the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

2. It is the intention of the common council that the procedures, processes, and trial under this section shall be conducted in the same manner as provided in s. 62.50, Wis. Stats. (1983). *(Ch. Ord. 341, File #68-453-b, June 25, 1968; formerly s. 21-14-2.)*

22-13. Fire Chief; Deputies. 1. Effective May 1, 1928, the position of first assistant engineer of the fire department of the city of Milwaukee be and hereby is abolished.

2. Effective May 1, 1928, there are hereby created two positions in the fire department of said city, each to be known as deputy chief engineer.

3. All appointments of deputy chief engineers, whether original or to fill a vacancy, shall be made by the chief engineer of the fire department, with the approval of the board of fire and police commissioners.

4. They shall be subject to suspension or removal in accordance with the laws and ordinances which may be applicable to the case of other members of the fire department at the time of such suspension or removal.

5. During the absence or disability of the chief engineer, or during a vacancy in that office, the deputy chief engineers shall in the order of their rank, have full power and authority and it shall be their duty to do all the acts required by law to be done by the chief engineer or imposed upon him by law or the ordinances of the city, and shall be subject to the same liabilities and penalties. This provision shall have reference to those duties which are required by law to be done by the chief engineer including ministerial acts only and the chief engineer shall have authority to assign any of the other duties of the department as he sees fit.

6. The rank of said deputy chief engineers shall be determined by the order in which their names are submitted by the chief engineer to the board of fire and police commissioners for approval. *(S. 1 thru 6, Ch. Ord. 26, Jan. 30, 1928.)*

22-14. Fire Department Organization. The common council shall have power to purchase fire engines and other fire apparatus, and to organize a fire department, composed of a chief engineer and such other officers and men as shall be required and employed in the management and conduct of such fire engines and apparatus, and to establish rules and regulations for such department. *(S. 23, Ch. Ord. 326, Nov. 29, 1966.)*

22-15. Fire Department Personnel. In addition to the officers and men now authorized to be employed in the fire department of the city of Milwaukee, including the assistant superintendent of fire-alarm telegraph, the superintendent of machinery and apparatus and the secretary now appointed and employed under ordinances of said city; and which several officers last named are hereby constituted and confirmed as officers of the department; there may also be appointed hereafter by the chief, with the approval of the board of fire and police commissioners, as provided by law, a third assistant engineer, a chief operator of fire-alarm telegraph and two assistant operators of fire-alarm telegraph. *(S. 1, Ch. 336, L. 1887.)*

[Pages 138 to 140 are blank]

STATE OF WISCONSIN : : CIRCUIT COURT : : MILWAUKEE COUNTY

JULIA COLE

Plaintiff,

and

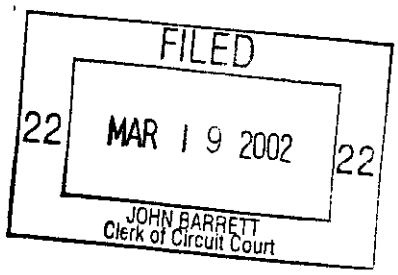
CITY OF MILWAUKEE

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

Defendants.



Case No. 01-CV-007770

Case Code: 30107
(Personal Injury - Other)

AFFIDAVIT OF BRADLEY DEBRASKA
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN }
} ss.
MILWAUKEE COUNTY }

I, Bradley DeBraska, being duly sworn upon oath do state that:

1. I am the President of the Milwaukee Police Association and have served in that capacity since January of 1989.

2. Prior to being elected as President, I had served as a member of the Milwaukee Police Association's Executive Board beginning January of 1986; a position which I continue to hold as President.

3. I was appointed to the Milwaukee Police Department ("MPD") in 1977.

4. I make this affidavit in opposition to the defendants' Motion For Summary Judgment.

5. I have knowledge of the facts stated herein.

6. The primary purpose of Police Officers is the detection and prevention of crime, as well as the apprehension of criminals; the primary function of Police Officers is to further those purposes.

7. In June of 1977 the MPD stopped manning ambulances. After that date, Officers with the MPD no longer had, as one of their primary functions, the rescuing of citizens. Rather, that job was turned over to the Milwaukee Fire Department ("Fire Department"); the only exception being with the Underwater Investigative Unit (Scuba Team) which, upon information and belief, comprises approximately 10 members out of the current 2000 officers on the MPD.

8. MPD Officers are currently trained at the Police Safety Academy and, during such time, do not undergo any training pertaining to rescuing citizens.

9. MPD Officers currently receive only limited first aid training through the Safety Academy.

10. MPD Officers -- other than those few officers specifically assigned to the Underwater Investigative Unit (Scuba Team) -- are trained to contact the Fire Department or request an ambulance when coming in contact with an individual who is injured, in need of medical assistance, or needs to be rescued.

11. I am familiar with MPD issued Training Bulletins and am unaware of any such bulletin since 1977 which directed MPD Officers to provide medical attention (other than basic first aid) to injured individuals with whom they come in contact and who are either injured or in need of medical attention.

12. Likewise, I am unaware of any MPD issued Training Bulletins ever directing MPD Officers to take "rescue-type" action, other than those which may have been directed to the Underwater Investigative Unit (Scuba Team).

13. While MPD Officers may, in the course of their employment, occasionally enter into the "rescuer" mode, those situations are few and far between; such action is certainly neither an MPD Officer's primary function, nor one for which training is provided.

14. I am aware that, prior to Officer Cole's being attacked by the defendants' dog, she had occasion to catch a stray dog only 3-4 times during her 6 years with the MPD; a frequency which, in my opinion and based upon my experience with the MPD and the MPA, is typical.

15. Although Police Officers do have an obligation under §174.042, STATS. -- along with "humane officers" and "local health officers" -- to capture and restrain a dog which is running at large, complying with such obligation is certainly not an MPD Officer's primary function, nor one which an MPD Officer would even expect to perform with any frequency of any consequence.

16. I am unaware of any MPD issued Training Bulletins ever directing MPD Officers to take action to capture and restrain dogs that are running at large.

17. I am unaware of any MPD issued Training Bulletins ever directing MPD Officers on the manner in which to use the "noose" -- a device consisting of a pole with a "noose-like" rope attached to the pole's end, which has been purchased by the MPD for the purpose of capturing animals and which is supposed to be placed in MPD squad cars.

18. The Milwaukee Police Association shares Officer Cole's concern in the present litigation, namely; that the "Firefighter's Rule" not be expanded to encompass actions taken by City of Milwaukee Police Department Officers while acting in the course of their employment.

19. To that end, true and correct copies if the following documents are attached and marked accordingly:

Exhibit A	Wisconsin Administrative Code on The Law Enforcement Standards Board (WI ADC LES 3.01), setting forth the Law Enforcement Code of Ethics, which describes what the State of Wisconsin has determined to be the "fundamental duties" of a Police Officer (pertinent portions highlighted).
Exhibit B	Wisconsin Administrative Code on The Law Enforcement Standards Board (WI ADC LES 3.03), setting forth the Instructional Goals of law enforcement training.
Exhibit C	Wisconsin Administrative Code on The Law Enforcement Standards Board (WI ADC LES 3.06), setting forth Additional Training for law enforcement officers.

Dated this 19th day of March, 2002.

Bradley DeBraska

Subscribed and sworn to before me this
19th day of March, 2002.

Cindy M. Mahlor
Notary Public, State of Wisconsin
My commission: 3-21-2004

WISCONSIN ADMINISTRATIVE CODE
LAW ENFORCEMENT STANDARDS BOARD
CHAPTER LES 3. TRAINING STANDARDS
Current through Reg. No. 553 (January, 2002).

LES 3.01 Minimum standards for preparatory training.

(1) Minimum standards for preparatory training for law enforcement and tribal law enforcement officers shall require that:

(a) The minimum amount of preparatory training which must be successfully completed by a law enforcement or tribal law enforcement recruit before that recruit may be certified as eligible for permanent appointment shall be a total of 400 hours. The subjects and the minimum time during which they are to be covered in this preparatory training shall be determined by the board after due consideration of recommendations made by the advisory curriculum committee identified in s. LES 3.02. The curriculum so decided upon may be changed by the board as the need becomes apparent due to technological changes affecting law enforcement, current problems involving the public welfare or additional recommendations made by the advisory curriculum committee. Instructional goals for the 400 hour preparatory training course approved by the board are identified in s. LES 3.03.

(b) Trainees shall obtain passing grades of at least 70% or its lettered equivalent in written examinations in all subjects with the exception of competency-based subjects for which there are board approved examination checklists. For the competency-based subjects, trainees must demonstrate their achievement of training objectives to the satisfaction of board certified instructors.

(c) Each trainee must successfully complete this training within the original probationary period. Under justifiable circumstances, this period may be extended for a period not to exceed one year, but the total period during which a person may serve as a full-time law enforcement or tribal law enforcement officer on a probationary or temporary basis without successfully completing this training shall not exceed 2 years. Part-time officers must successfully complete the entire course in not more than 3 years. The total period during which a person may serve as a part-time law enforcement or tribal law enforcement officer on a probationary or temporary basis without successfully completing this training shall not exceed 3 years. For purposes of this section a part-time law enforcement or tribal law enforcement officer is a law enforcement or tribal law enforcement officer who routinely works not more than one-half of the normal annual work hours of a full-time employee of the employing agency or unit of government.

(d) The law enforcement code of ethics, as set forth below, shall be administered as an oath to all trainees during the preparatory course.

1. AS A LAW ENFORCEMENT OFFICER, my fundamental duty is to serve humanity; to safeguard lives and property; to protect the innocent against deception, the

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weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all persons to liberty, equality and justice.

2. I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in though and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of m duty.

3. I WILL never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

4. I RECOGNIZE the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of th police service. I will constantly strive to achieve these objectives and ideals dedicating myself to my chosen profession...law enforcement.

(2) Minimum standards for jail and secure detention officer preparatory training shall be as follows:

(a) A minimum of 120 hours of preparatory training shall be successfully completed by a jail or secure detention officer recruit before that recruit may be certified as eligible for permanent appointment. The subjects and minimum number of hours for each subject to be covered in this preparatory training shall be determined by the board. The instructional goals may be changed by the board as the need becomes apparent due to technological changes affecting jail or secure detention administration, current problems involving the public welfare or additional recommendations made by the advisory curriculum committee identified in s. LES 3.02. Instructional goals for the 120 hour preparatory training course approved by the board are identified in s. LES 3.04.

(b) Trainees shall obtain passing grades of at least 70% or its lettered equivalent in written examinations in all subjects with the exception of competency-based subjects for which there are board approved examination checklists. For the competency-based subjects, trainees must demonstrate their achievement of training objectives to the satisfaction of board certified instructors.

(c) Each recruit shall successfully complete this training within his or her original probationary period. Under justifiable circumstances this period may extended for a period not to exceed one year.

(3) It should be noted that the foregoing represents the minimum amount of training required. Additional preparatory training is strongly recommended whe the employing authority is in a position to require it.

History: Cr. Register, September, 1970, No. 177, eff. 10-1-70; am. (1) (a) Register, October, 1973, No. 214, eff. 11-1-73; am. (1) (c), Register, August, 1976, No. 248, eff. 9-1-76; am. (1) (intro.), (a) and (c), renum. (2) to be (3

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WI ADC S LES 3.01

cr. (2), Register, October, 1984, No. 346, eff. 11-1-84; correction in (1) (c) made under s. 13.93 (2m) (b) 5., Stats., Register, October, 1984, No. 346; correction in (1) (d) made under s. 13.93 (2m) (b) 5., Stats., Register, August 1993, No. 452; am. (1) (intro.), (a) and (c), (2) (intro.) and (a); r. and recr (1) (b), Register, November, 1997, No. 503, eff. 12-1-97.

WI ADC s LES 3.01
END OF DOCUMENT

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WISCONSIN ADMINISTRATIVE CODE
LAW ENFORCEMENT STANDARDS BOARD
CHAPTER LES 3. TRAINING STANDARDS
Current through Reg. No. 553 (January, 2002).

LES 3.03 Instructional goals.

The board shall approve student performance objectives to reach the following instructional goals for preparatory law enforcement and tribal law enforcement training:

(1) Demonstrate professional orientation.
(2) Demonstrate defensive tactics.
(3) Demonstrate care and use of firearms.
(4) Demonstrate community awareness.
(5) Perform emergency medical services.
(6) Demonstrate knowledge of legal procedures.
(7) Operate patrol vehicles.
(8) Enforce traffic laws and conduct accident investigations.
(9) Perform patrol operations.
(10) Conduct investigations.
(11) Reach performance objectives for elective subjects.
(12) Follow administrative procedures.

History: Cr. Register, February, 1981, No. 302, eff. 3-1-81; r. and recr., Register, November, 1997, No. 503, eff. 12-1-97.

WI ADC s LES 3.03
END OF DOCUMENT

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Citation Search Result Rank 1 of 1 Database
WI ADC S LES 3.06 WI-ADC
Wis. Adm. Code s LES 3.06
Wis. Admin. Code s LES 3.06

WISCONSIN ADMINISTRATIVE CODE
LAW ENFORCEMENT STANDARDS BOARD
CHAPTER LES 3. TRAINING STANDARDS
Current through Reg. No. 553 (January, 2002).

LES 3.06 Additional orientation.

Recommended additional recruit officer orientation by the employing agency should consist of each of the following subjects for a total of at least 120 hours:

(1) Departmental policies, rules and regulations and local ordinances.

(2) Firearms (familiarization with local weaponry and additional practice to improve proficiency with sidearm).

(3) Field training (with supervisor or coach).

History: Cr. Register, February, 1981, No. 302, eff. 3-1-81; renum. from LES 3.04, Register, October, 1984, No. 346, eff. 11-1-84; renum. from LES 3.05, Register, February, 1991, No. 422, eff. 3-1-91.

WI ADC s **LES 3.06**
END OF DOCUMENT

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

vs. Case No. 02-1416

YVONNE L. HUBANKS, AUBREY HUBANKS, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR MILWAUKEE COUNTY, THE HONORABLE WILLIAM J. HAESE,
PRESIDING, CASE NO. 01-CV-007770

BRIEF OF DEFENDANTS-RESPONDENTS

PETERSON, JOHNSON & MURRAY, S.C.
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STATEMENT OF ISSUES

1. Should the firefighter's rule be extended to a police officer engaged in protecting the public?

Answered by the trial court: Yes.

2. Should appellant's claims of violations of Milwaukee ordinances and failure to warn survive even if the firefighter's rule applies?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the arguments have been adequately briefed. Publication would be appropriate as this case meets the criteria set forth in §809.23(1) 1 and 2, Wis. Stats.

TABLE OF AUTHORITIES

ARGUMENT

I. THE TRIAL COURT PROPERLY APPLIED "THE FIREFIGHTER'S RULE" TO POLICE OFFICERS.

In its decision and order, the trial court set forth the origin of the firefighter's rule as well as the subsequent cases interpreting it. Appellant summarized the holdings of all relevant cases which have interpreted the firefighter's rule since it was first set forth in Hass v. Chicago & Northwestern Railway, 48 Wis.2d 321, 179 N.W.2d 885 (1970). There is no need to repeat the holdings of these cases herein. The issue in this case is whether the firefighter's rule should apply to a police officer injured while attempting to apprehend a stray dog. In analyzing the history of the firefighter's rule, it becomes clear that the rule should be extended to apply to police officers in situations such as that present in this case.

Up until 2000, when the Supreme Court decided Pinter v. American Family Mutual Insurance Company, 2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110 (2000), the firefighter's rule had only been applied to cases involving firefighters. However, the Supreme Court in Pinter extended the firefighter's rule to apply to an emergency medical technician who was injured while responding to an automobile accident. In holding that the firefighter's rule would be applied to an EMT, the Supreme Court noted that "firefighting and emergency medical

assistance are closely related professions." The court noted that people in either profession "know that they will be expected to provide aid and protection" to people in hazardous circumstances. Pinter at ¶43. The EMT, "was asked to put himself in harms way for the protection of another, more seriously endangered individual." Pinter at ¶44.

In the present case, appellant attempts to distinguish a police officer from a firefighter or EMT, arguing that it is not a police officer's primary function to rescue people in danger. In Pinter, however, the court did not focus on the fact that firefighters or EMTs are "rescuers" as much as the fact that they are in a position where they are trained to "confront danger." Pinter at ¶44. Certainly, police officers are trained to confront danger. In fact, the affidavit of Bradley Debraska acknowledges that police officers have a duty under Wis. Stats. §174.042, to capture and restrain a dog which is running at large. (R17:2) Obviously, one purpose of an officer attempting to capture a dog running at large is to protect the public from hazardous or dangerous situations that the dog may present. Furthermore, although appellant claims that the Milwaukee Police Department doesn't provide any training on how to capture or handle stray dogs, she does acknowledge that some squad cars are equipped with a "noose" to be used to capture stray animals. Why would equipment be

generally available to police if they were not expected to capture stray animals? Although appellant claims to have had no professional training in capturing stray dogs, she voluntarily chose to attempt to capture the dog she encountered on the date of the incident, because it was her job to "put herself in harm's way for the protection of others." Presumably, she did this because she was specially employed and trained to confront danger, and she was doing her job as a police officer. In this respect, this case is no different from the Hass or Pinter cases, wherein the firefighter and EMT, respectively, were putting themselves in harm's way for the protection of others -- in other words, they were doing their jobs just as appellant was in this case. While the injuries sustained by appellant are unfortunate, they were sustained while she was confronting danger to protect others.

In Pinter, the Supreme Court stated as follows:

> Fundamentally, the rule recognized in Hass is an expression of public policy because it prohibits a firefighter from "complaining about the negligence that creates the very need for his or her employment." Hauboldt, 160 Wis.2d at 676, 467 N.W.2d 508 (quoting Mignone v. Fieldcrest Mills, 556 A.2d 35, 39 (R.I. 1989)). As stated by the Supreme Court of Hawaii:
>
> > The very purpose of the firefighting profession is to confront danger. Firefighters

> are hired, trained, and compensated to deal with dangerous situations that are often caused by negligent conduct or acts. "It offends public policy to state that a citizen invites private liability merely because he happens to create a need for those public services."
>
> Thomas, 811 P.2d at 825. Permitting firefighters to pursue actions like the one in Hass is therefore not consistent with the relationship of the firefighting profession to the public. See id. It would contravene public policy to permit a firefighter to recover damages from an individual who has already been taxed to provide compensation to injured firefighters. Hauboldt, 160 Wis.2d at 677, 467 N.W.2d 508 (citing Mignone, 556 A.2d at 39).

Pinter at ¶39.

In this case, appellant should not be allowed to complain about the negligence that created the very need for her services -- that being the alleged negligence of respondents allowing their dog to run loose. In choosing to attempt to catch the dog, appellant was doing her job as a police officer -- confronting a dangerous situation -- and thus she should not be allowed to recover while injured in the course of that duty. There is no difference between what appellant was doing in this case and what the firefighter or the EMT were doing in the Hass and Pinter cases.

Appellant's attempts to distinguish this case from Hass

and Pinter because she was not a "rescuer" should be rejected. Hass and Pinter were not decided on the basis of whether the firefighter or EMT were rescuing someone when they were injured. Those cases were based on the fact that these professionals, whose job it was to "put themselves in harm's way for the protection of others" were injured while responding to a situation they were called to in performance of their professional duties. Simply because appellant in this case was not rescuing a human being does not bring this case out of the realm of Hass and Pinter.

Appellant argues that police officers should not be encompassed within the firefighter's rule, likening this case to Mullen v. Cedar River Lumber Co., 246 Wis. 2d 524, 630 N.W.2d 574 (Ct. App. 2001). In that case, a superintendent of public works was injured when responding to an oil spill, and the Court of Appeals refused to apply the firefighter's rule to bar the action. The court based its decision on the fact that the superintendent of public works job was not similar to the role of a firefighter or EMT. The court noted that, "unlike firefighters and EMTs, Mullen is not a professional rescuer who is 'specially trained and employed to conduct rescue operations in dangerous emergencies.'" Mullen at ¶16 quoting Pinter, 2000 WI 75 at ¶43, 236 Wis.2d 137, 613 N.W.2d 110. Clearly, the job of a police officer is more akin to the

job of a firefighter or an EMT than a superintendent of public works. There is clearly an element of danger and a requirement of special training for a police officer to handle situations which would put the police officer in harm's way. The same cannot be said for a superintendent of public works. Even if a police officer cannot be termed a "professional rescuer," as appellant seems to be arguing, a police officer is clearly in a job where he or she faces emergency situations or confronts danger on a regular basis.

The trial court referred to a case from California, Neighbarger v. Irwin Industries, Inc., 8 Cal. 4th 532, 882 P.2d 347 (1994) in its decision. Neighbarger involved a claim by safety employees against the employer of a maintenance worker who allegedly started a fire. The Supreme Court of California held that the firefighter's rule did not bar the claim by the safety employee. The court stated:

> We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation. Nonetheless, a special rule has emerged limiting the duty of care the public owes to firefighters and police officers. Under the firefighter's rule, a member of the public who negligently starts a fire owes no duty of care to assure that the firefighter who is summoned to combat the fire is not injured thereby. (Walters v. Sloan (1977) 20 Cal. 3rd 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609 (Walters); see also 6 Witkin, Summary of Cal. Law, supra, Torts, Sec. 739, p. 69; Levy, et

> al., California Torts (1993) Sec. 1.03 [4][b], p. 1-29.) Nor does a member of the public whose conduct precipitates the intervention of a police officer owe a duty of care to the officer with respect to the original negligence that caused the officer's intervention. (Walters, supra, 20 Cal. 3rd 199, 142 Cal. Rptr. 152, 571 P.2d 609; Hubbard v. Boelt (1980) 28 Cal. 3rd 480, 169 Cal. Rptr. 706, 620 P.2d 156.)

Neighbarger at 351-352.

In Hubbard v. Boelt, supra, a policeman was injured during a high speed chase when he attempted to avoid highway debris which was on the road due to an accident involving the motorist he was attempting to apprehend. The Supreme Court of California barred recovery by the police officer based on the firefighter's rule:

> As we recently stated, "the fireman's rule provides that negligence in causing a fire furnishes no basis for liability to a professional fireman injured fighting the fire." (Walters v. Sloan, supra, at p. 202) The rule, which has been held equally applicable to policemen injured in the course of their duties, is based on the principle that it is the business of a fireman or policeman to deal with particular hazards, and that accordingly "he cannot complain of negligence in the creation of the very occasion for his engagement." (Giorgi v. Pacific Gas & Elec. Co. (1968) 266 Cal. App.2d 355, 359 [72 Cal. Rptr. 119]; see Walters at p. 202; Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3rd 361, 369 [99 Cal. Rptr. 29, 491 P.2d 821].) In Walters, we reiterated and confirmed the rationale underlying the firemen's rule, observing that it is based upon (1) the

> traditional principle that "one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby," (p. 204), and (2) a public policy to preclude tort recovery by firemen or policemen who are presumably adequately compensated (in special salary, retirement and disability benefits) for undertaking their hazardous work (pp. 204-206).

Hubbard at 484.

The Georgia Court of Appeals has also expanded the firefighter's rule to apply to a police officer. In Martin v. Gaither, 219 Ga. App. 646, 466 S.E.2d 621 (1995), the plaintiff police officer was injured when he stepped into the street to talk to a motorist who was disobeying a traffic sign. He was struck by a bus as he was instructing the illegally parked motorist. The police officer brought an action against the motorist as well as the bus company. In holding that the firefighter's rule applied to the cause of action against the motorist, the court made mention of the fact that the police officer's occupation "as a traffic cop intrinsically or inherently requires risk-taking in or about traffic." Martin at 650. Ultimately, the court expanded the firefighter's rule to this police officer, noting that a tort claim could not be based upon damage caused by the very risk the officer is paid to encounter and for which he is trained. Martin at 651. The court quotes a New Jersey decision, Krauth v. Geller, 157 A.2d 129, 31 N.J. 270 (1960) for the

proposition that the motorist who was illegally parked did not owe the police officer a duty to exercise care "so as not to require the services for which he is trained and paid." Martin at 651 quoting Krauth at 131.

These jurisdictions recognize that it is not the act of rescuing which bars a firefighter or police officer from making a claim, rather it is the fact that they are responding to a danger or knowingly confronting a hazard that bars their claim. Firefighters and police officers have similar roles within the community, to protect the public from dangerous situations. Whether fighting a fire or capturing a stray dog, firefighters or policemen are both knowingly confronting danger. This is their job, and they should not be allowed to maintain claims against individuals whose alleged negligence necessitates their services.

II. EXPANSION OF THE FIREFIGHTER'S RULE TO POLICE OFFICERS WOULD NOT ALLOW THE EXCEPTION TO SWALLOW THE GENERAL RULE.

Appellant argues that expansion of the firefighter's rule to police officers would "enter a field that has no sensible or just stopping point." (Appellant's brief at p. 23) Appellant points out five situations that she claims the firefighter's rule would apply to if this court expanded the firefighter's rule to include police officers. For example, she states that expansion of the firefighter's rule would

serve to bar a school safety officer from suing if injured due to the negligence of students, bar a teacher from suing a child for injury sustained due to the child's negligence or bar an emergency room doctor or nurse from suing a patient when they are injured as a result of the patient's negligence. (Appellant's brief at p. 22)

First, the expansion of the rule to police officers would have no effect on a claim brought by a school safety officer, teacher or emergency room doctor or nurse. Those cases would have to be decided upon their own merits. In this case, this court is only deciding whether to expand the firefighter's rule to include police officers. Given the similarities of the two professions, expansion of the rule to police officers makes sense. Secondly, several of the examples cited by appellant are appear to be taken directly from the dissenting opinion of Justice Shirley Abrahamson in her dissent in the Pinter case. Pinter at ¶55. Obviously, the majority of the Supreme Court felt otherwise. In this regard, the majority clearly stated that it was expanding the firefighter's rule to EMTs in the Pinter case only "under these limited circumstances." Pinter at ¶50. Similarly, defendants are asking this court to expand the firefighter's rule to police officers only under limited circumstances, and are not asking for a blanket exception to be carved out for any individuals

who may be faced with a dangerous situation while in the course of their employment.

III. ALL OF APPELLANT'S CLAIMS ARE BARRED AS THE CLAIMS ARE BASED SOLELY ON DEFENDANT'S INITIAL ACTS OF ALLEGED NEGLIGENCE.

Appellant argues that because she has alleged negligence under several theories, some of which are not based solely on the initial act of negligence by respondents, some of her claims should survive. The trial court, however, disagreed, based on Wisconsin precedent.

A. Appellant's Cause of Action Based on Violation of a Milwaukee Ordinance Was Properly Dismissed.

Appellant claims that respondents violated Chapter 78 of the Milwaukee Code of Ordinances in harboring a dangerous animal and in failing to muzzle the animal. Appellant indicates that her causes of action based on violation of these ordinances survive as long as she can demonstrate that she, as a police officer, was within the scope of those whom the ordinances were meant to protect. (Appellant's brief at p. 26) As explained by the trial court, any alleged violation of ordinance is not a violation of a statute specifically enacted to protect police officers from injury. (R19:3) The court noted that a statute such as this is enacted to protect the public in general and punish dog owners, however as a police officer, appellant undertakes such jobs as encountering stray animals that are potentially dangerous. (R19:3) The

trial court pointed out that in Pinter, a similar argument was made, but rejected by the Supreme Court. (R19:3) In that case, Pinter suggested that the negligent drivers who caused the accident violated a motor vehicle code, and that provided a separate basis for recovery. In rejecting this argument, the Pinter court stated:

> However, "the protection of a safety statute or ordinance is extended only to those whom the enactment was intended to protect." Clark, 75 Wis.2d at 299, 249 N.W.2d 567. Unlike the Municipal Housing Codes at issue in Clark, motor vehicle code provisions are not arguably designed to protect rescuers in the performance of their duties. See Clark 75 Wis.2d at 300, 249 N.W.2d 567. We conclude that an automobile collision is equivalent to a fire under the public policy analysis in Hass.

Pinter at ¶46.

Similarly, the trial court in the present case stated that the ordinances which appellant claims were violated in this case are enacted to protect the public in general and punish dog owners, not police officers in the performance of their duties. (R19:3)

Appellant claims that the trial court "misconstrued" Clark v. Corby, 75 Wis.2d 292, 249 N.W.2d 567 (1977). However, this becomes moot in light of the Supreme Court's statements in the Pinter case, quoted above. Whereas the Clark court may not have gone as far as saying that the a plaintiff has to prove that an ordinance was "specifically

enacted" to protect a firefighter, the Pinter court clearly takes that extra step, and indicates that motor vehicle code provisions are not arguably designed to protect rescuers in the performance of their duties. The ordinance for keeping animals, which is at issue in this case, is akin to the motor vehicle ordinances, in that it was clearly meant to protect the public at large. Ordinance 78-3 reads as follows:

> 78-3. Owner or caretaker's duty; presumption. 1. The owner or caretaker of any animal shall confine, restrain or maintain control over the animal so that the unprovoked animal does not attack or injure any person or domesticated animal.

(R16:20)

Nowhere in Chapter 78 of the Milwaukee Ordinances is there any reference to protection of police officers. The simple fact that appellant herein was a member of the public as well as being a police officer does not bring her within the realm of protection of the statute when she was engaging in her occupation of police officer. Appellant's claim that the ordinance was meant to protect her because she "remains a member of the public, regardless of the facts (sic) that she was wearing her uniform at the time of her injury," is contrary to the Pinter court's decision in this regard.

B. Appellant's Causes of Action Based Upon Failure to Warn Were Properly Dismissed.

Appellant argues that her causes of action based on defendant's failure to warn should survive even if this court finds that the firefighter's rule applies. However, appellant fails to explain how the respondents could possibly have warned her of any dangerous propensities of their dog, when there is no evidence that they knew their dog was loose or that appellant was trying to catch it. Appellant claims that respondents "had the opportunity to warn and could have warned by simple compliance with the ordinance requiring use of a muzzle." (Appellant's brief at p.30) First, if they are alleging failure to muzzle the dog, that is an allegation of violation of the Milwaukee ordinance, which, as indicated in the previous section, was not meant to apply to protect police officers. Secondly, it makes no sense to argue that respondents had a duty to warn appellant of anything, when they had absolutely no contact with her whereby they had the opportunity to warn. If this were a case where respondents themselves called the police to report that their dog was missing, and failed to advise that their dog had dangerous propensities, if in fact it did, the failure to warn argument may apply. However, it is not applicable in a situation where there was no opportunity to warn. As a result, appellant's causes of action based on failure to warn must fail.

The Hass court touched on the issue of warning. The court noted:

> It is therefore obvious that the duty of a landowner to a firefighter in respect to warning of the hazard is satisfied by the very nature of the call for assistance. The hazard of fire feared by the landowner and for which he asks aid in fighting is the very reason for the summons to duty. The call to duty is the warning of the hazard; and even in the absence of a summons by the occupier of the land, the hazards of fire are apparent. . . .

Hass at 324-325. Similarly, in the present case, even though the appellant was not called to capture the dog, the hazards of a large dog, unknown to the appellant, were apparent. In light of the fact that the respondents had no opportunity to warn, and that the danger in confronting a strange dog was obvious, the cause of action based on failure to warn was properly dismissed.

CONCLUSION

Clearly, appellant, as a police officer, worked in an environment where she was confronted with dangerous situations daily. It was her job was put herself in harm's way for the protection of the public. Like a firefighter or an EMT who responds to a fire or an accident, appellant was responding to a dangerous situation and was unfortunately injured. However, like the firefighter in Hass and the EMT in Pinter, she should not be allowed to maintain her cause of action against the

allegedly negligent citizen who created the very situation she was responding to. In addition, any other causes of action set forth in appellant's complaint must also fail, as they are based on either ordinances which were not meant to protect appellant as a police officer, or based on a failure of the respondents to warn appellant of the danger propensities of their dog, which was impossible given that they had no contact with her prior to her injury.

For the reasons set forth above, and based on the Wisconsin precedent set forth in the Hass and Pinter cases, respondents respectfully request that this court affirm the decision and order of the trial court granting summary judgment to respondents and dismissing appellant's complaint.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), STATS., as modified by the court's order for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 16 pages.

Dated: September 17, 2002

PETERSON, JOHNSON & MURRAY, S.C.

By: Janet E Cain
Janet E. Cain

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

JULIA COLE,

Plaintiff-Appellant,

CITY OF MILWAUKEE,

Involuntary Plaintiff,

v.

YVONNE L. HUBANKS,
AUBREY HUBANKS and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

COURT OF APPEALS CASE NO. 02-1416

APPEAL FROM AN ORDER OF
THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE WILLIAM J. HAESE, PRESIDING
MILWAUKEE CIRCUIT COURT CASE NO. 01-CV-007770

PLAINTIFF-APPELLANT'S REPLY BRIEF

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1. Expansion of the Firefighter's Rule to Police Officers would be at odds with the public policy set forth in *Hass* and *Pinter*

In ***Hass v. Chicago & Northwestern Railway***, *48 Wis.2d 321, 179 N.W.2d 885(1970)*, our Supreme Court stated that the duty of a landowner to a firefighter is satisfied by the very nature of the call, reasoning that allowing a firefighter who was injured while fighting the fire would place an unreasonable burden on the person that negligently caused the fire. ***Id.*** *@ 327.*

The premise behind this judicial public policy is, most reasonably, to permit individuals who require emergency assistance as a result of starting or failing to curtail a fire, to summon aid without having to pause to consider whether they will be held liable for their negligence in starting or failing to curtail the fire. If a negligent fire-starter is concerned about liability for damages to those who respond to fight the fire, he might either delay in, or completely refrain from, alerting the authorities as to the existence if the fire. Public policy, represented by the society's best interest, is in favor of extinguishing fires as soon a possible. That which interferes with extinguishing fires as soon as possible is therefore at odds with society's

best interest. The underlying principle behind the public policy set forth in ***Hass***, must, therefore, be to prevent tort law from interfering with the greater social good of rapid fire suppression.

According to ***Pinter v. American Family Insurance Co.***, *2000 WI 75, 236 Wis.2d 137, 613 N.W.2d 110(2000)*, the public policy set forth in ***Hass*** also applies to Emergency Medical Technicians ("EMTs").

Application to EMT's of the principle underlying ***Hass's*** public policy is understandable; if one who negligently causes an automobile collision is concerned about liability to those who respond to render medical assistance, the negligent driver may delay in calling for assistance, or not call at all. As the greater social good is to place nothing in the path of a negligent motorist summoning medical assistance for himself or others, ***Pinter*** followed ***Hass*** and held that allowing EMT's to recover damages against the driver whose negligence was the *sole cause* of the emergency response, would place an unreasonable burden on drivers who negligently cause collisions. ***Pinter*** @ ¶47, *citing* ***Hass***, *48 Wis.2d @ 327, 179 N.W.2d 885*.

However, as the primary function of police officers is that of law enforcement, as opposed to rescue operations,

P.App.182-184, the principle behind the public policy pronouncements of ***Hass*** and ***Pinter*** does not translate to police officers.

Defendants-respondents ("Hubanks"), wrongly argue that the Firefighter's Rule applies to those "in a position where they are trained to confront danger," ***Respondent's Brief*** @ *p.2*, as opposed to trained professional rescuers. Although ***Pinter*** did refer to the confrontation of danger, that reference was most reasonably to the danger posed to others in terms of loss of life and limb *associated with rescue operations*. ***See Pinter*** @ ¶*43*. In comparing EMT's to firefighters, ***Pinter*** stated:

> In short, ***both EMT's and firefighters are professional rescuers who are specifically trained and employed to conduct rescue operations in dangerous emergencies***. *See* ***Maltman v. Sauer***, *84 Wash.2d 975, 530 P.2d 254, 257 (1975)*(holding that a professional rescuer may not recover damages for an injury that is "the result of a hazard generally recognized as being within the scope of dangers identified with the particular rescue operation"). ***Id.*** @ ¶*43*. *(emphasis added.)*

Pinter's specific citation to ***Maltman v. Sauer*** confirms that ***Pinter's*** reference to "danger" was meant to encompass the danger posed to another in terms of loss of life and limb associated with rescue operations.

Maltman addressed the application of the "rescue doctrine" to non-voluntary rescuers. ***Maltman*** *@ 976-977, 530 P.2d 254, 256-257.* There, the administrator of the estates of several active members of the United States Army who died in a helicopter crash *en route* to perform rescue operations as a result of an automobile accident, sued the negligent driver for wrongful death. ***Id.*** ***Maltman*** concluded that:

> [t]he proper test for determining a ***professional rescuer's right to recover*** . . . is whether the hazard ultimately responsible for causing the injury is inherent within the ambit of those dangers which are unique to and generally associated with the ***particular rescue activity*** . . . when the injury is the result of a hazard generally recognized as being within the scope of dangers identified with the ***particular rescue operation***, the doctrine will be unavailable . . . ***Id.*** *@ 979, 530 P.2d 254, 257. (emphasis added.)*

If, as asserted by Hubanks, an EMT's status as a "professional rescuer" was insignificant in ***Pinter's*** determination to expand the Firefighter's Rule to encompass EMT's, then why the citation to ***Maltman***?

Immediately following ***Pinter's*** citation to ***Maltman***, the Court then explained how the facts in ***Pinter*** (i.e., EMT Pinter's special training in rescue operations, experience in extricating individuals from automobiles, and the fact that

his job required him to be placed in harms way for another *more seriously* endangered individual) supported application of the rule. ***Id.*** @ ¶44.

If, as asserted by the Hubanks, an EMT's status as a "professional rescuer" was not significant to ***Pinter's*** expansion of the Firefighter's Rule to encompass EMT's, then why the specific reference to EMT Pinter's training and experience in rescuing injured motorists?

As recognized in ***Hass***, and reiterated in ***Pinter***, the Firefighter Rule:

> . . . bars a cause of action ***only*** when the sole negligent act is the same negligent act that ***necessitated rescue*** and ***therefore brought the firefighter to the scene of the emergency***. ***Pinter***, *2000 WI 75 @ ¶31, 236 Wis.2d 137, 613 N.W.2d 110, citing* ***Hass***. *(Emphasis added).*

The public policy which allowed expansion of the Firefighter's Rule to EMT's, was therefore limited to prohibiting a professional rescuer from recovering damages in tort, when the sole negligent act was the same act which resulted in the rescuer responding to the scene of rescue. ***See Id.*** As police officers are neither firefighters, EMT's or trained professional rescuers, ***P.App.182-184***, expansion of the Firefighter's Rule to encompass them as a profession would be inconsistent with the public policy initially set forth in

Hass and reiterated in ***Pinter***.

Moreover, application of the Firefighter's Rule to police officers, simply because "they are in a position where they are trained to confront danger," ***Defendants'-Respondents' Brief*** *@ p.2*, would also result in the Rule's inevitable application to *any individual* who is trained to confront "danger," including security guards, emergency room personnel (i.e., doctors and nurses), Highway workers (whose jobs regularly subject them to significant danger at the hands of the public), bouncers, construction workers (whose employment poses numerous risks of injury at the hands of others) and, given the unfortunate current state of our public schools, even school administrators. Such a slippery slope was certainly never contemplated by ***Hass***, nor intended by ***Pinter***.

2. The cases applying the Firefighter's Rule to police officers should not guide this court, as they're based upon the Doctrine of Assumption of Risk and not the public policy set forth in *Hass* and *Pinter*.

The Hubanks cite ***Neighbarger v. Irwin Industries, Inc.*** *8 Cal.4th 532, 882 P.2d 347 (1994)*, ***Hubbard v. Boelt***, *28 Cal.3rd 480, 169 Cal.Rptr. 706, 620 P.2d 156 (1980)*, ***Martin v. Gaither***, *219 Ga.App. 646, 466 S.E.2d 621 (1995)* and ***Krauth v. Geller***, *31 N.J. 270, 157 A.2d 129 (1960)*, for the proposition

that the Firefighter's Rule should be applied to police officers. The Hubanks' assertion is misplaced.

The principle underlying the Firefighter's Rule in each of those jurisdictions is the Doctrine of Assumption of Risk. See ***Neighbarger,*** *8 Cal.4th 532, 882 P.2d 347, 351-352,* ***Hubbard,*** *28 Cal.3rd 480, 484, 620 P.2d 156, __,* ***Martin,*** *219 Ga.App. 646, 466 S.E.2d 621, 622, and* ***Krauth,*** *31 N.J. 270, 157 A.2d 129, 130-131 (1960).* However, Wisconsin's version of the Firefighter's Rule was never based upon assumption of risk. ***Wright v. Coleman,*** *148 Wis.2d 897, 904, 436 N.W.2d 864 (1989).* Rather, as recognized in ***Wright***:

> Where the negligence of the landowner was only 'in starting a fire and failing to curtail its spread' . . . ***as a matter of judicial public policy*** there should be no liability to a firefighter . . .
>
> ***Other jurisdictions have reached a similar conclusion . . . based upon a theory of assumption of risk -- a doctrine which is no longer recognized as per se a bar to liability in our negligence jurisprudence*** . . .
>
> This court, under the facts of ***Hass,*** *as a matter of policy* reached a result *consistent with* the "fireman's rule" . . . ***Wright*** *@ 904, 436 N.W.2d 864.*(emphasis added.)

Pinter also recognized that Wisconsin's version of the Firefighter's Rule was never based upon the doctrine of

assumption of risk. ***Id.***, *2000 WI 75, ¶¶35-36, 236 Wis.2d 137, 152-153, 613 N.W.2d 110 (2000).* Pinter stated:

> ***Hass was never premised on the idea that a firefighter's assumption of the risks inherent in his or her profession makes the firefighter's negligence greater than the alleged tortfeasor's . . . Hass*** was based squarely on Wisconsin's traditional public policy analysis. . . ***Id.*** *(emphasis added.)*

The Hubanks' properly assert that the jurisdictions applying the Firefighter's Rule to police officers do so based upon the doctrine of assumption of risk (i.e., the fact that they are responding to and knowingly confronting a hazard). ***Defendants'-Respondents' Brief*** *@ p.9.* However, as the basis for Wisconsin's version of the Firefighter's Rule is judicial public policy, as opposed to the doctrine of assumption of risk, the decisions of ***Neighbarger, Hubbard, Martin and Krauth*** are not persuasive authority for expanding Wisconsin's Firefighter's Rule to encompass police officers.

3. Even if this Court does expand the Firefighter's Rule to police officers, Officer Cole's claims nevertheless survive under recognized exceptions to the rule.

Wisconsin's version of the Firefighter's Rule bars a cause of action ***only*** when the sole negligent act is the same negligent act that ***necessitated rescue*** and ***therefore brought the firefighter to the scene of the emergency***. ***Pinter***, *2000*

WI 75 @ ¶31, 236 Wis.2d 137, 613 N.W.2d 110, citing ***Hass****. (emphasis added.)*

The facts of this case can be distinguished from both ***Hass*** and ***Pinter*** on four grounds. First, Officer Cole has plead causes of action based on facts *other than* the Hubanks' initial negligent act. Officer Cole plead causes of action based upon failure to warn and violations of the Milwaukee Code of Ordinances. ***P.App.118-121.*** All causes of action based upon a violation of a municipal ordinance survive as long as Officer Cole can demonstrate that she was within the scope of those whom the ordinance was meant to protect. ***Clark*** *@ 299-300.*

The Hubanks incorrectly assert that, after ***Pinter***, Officer Cole is unable to utilize the municipal ordinance exception to the Firefighter's Rule because the specific ordinances were not designed to protect police officers. ***Defendants'-Respondents' Brief*** *@ pp.11-12.* However, while ***Pinter*** rejected EMT Pinter's assertion that motor vehicle code provisions were meant to protect "rescuers" in the performance of their duty, there's a significant difference between the motor vehicle code which EMT Pinter *attempted* to utilize, and the ordinances Officer Cole *did* utilize.

Unlike in ***Clark,*** EMT Pinter did NOT plead the application

of an ordinance or specific statute. ***Pinter*** @ ¶¶*46,50*. ***Pinter*** found that EMT Pinter merely "suggested" that the motor vehicle codes generally prohibiting negligent driving should be classified as an exception to the Rule. ***Id.*** @ ¶*46*. In rejecting EMT Pinter's "suggestion," the Court stated:

> We emphasize that our public policy analysis is based on the fact that the only negligence Pinter complains of is the same negligence that caused the initial emergency and resulted in rescue personnel being called to the scene. ***Id.*** @ ¶*50*. *(emphasis added.)*

According to ***Clark v. Corby***, *75 Wis.2d 292, 249 N.W.2d 567 (1977)*, a claim of a municipal violation causally related to a plaintiff's injury survives a motion for summary judgment as long as "it can be shown *at trial* that the [plaintiff] is within the scope of protection of the ordinances allegedly violated . . . ." ***Id.*** @ *302*. *(emphasis added.)*

An ordinance would not be meant to protect a plaintiff in the context of the Firefighter's Rule, where its purpose has nothing to do with protecting the plaintiff. The municipal ordinance violations alleged in Officer Cole's Amended Complaint are meant to protect the public from dangerous animals. ***P.App.162-174***. Officer Cole remains a member of the public, regardless of the fact that she was acting in her capacity as a police officer at the time of her injury. All

causes of action specifically referencing a municipal violation therefore survive under ***Clark***. Similarly, all of Officer Cole's causes of action based upon the Hubank's failure to warn, survive under ***Clark*** and ***Wright v. Coleman,*** *148 Wis.2d 897, 436 N.W.2d 864 (1989).* ***Clark,*** *@ 299-300, 249 N.W.2d 567, 571;* ***Wright*** *@ 907, 436 N.W.2d 864, 868.*

Second, there was simply no rescue. Rescue has been a significant aspect of all Wisconsin cases involving the Firefighter's Rule, including ***Pinter.*** In ***Mullen v. Cedar River Lumbar Co.,*** *2001 WI App. 142, 246 Wis.2d 624, 630 N.W.2d 574 (2001),* the Court of Appeals recognized that ***Hass*** and ***Pinter*** applied the Firefighter's Rule to professional rescuers, specifically trained and employed to conduct rescue operations in dangerous emergencies. The Court stated:

> Although the superintendent had experience and some training in responding to fuel oil spills, it is undisputed that responding to spills constitutes only a small part of Mullen's job. He is also responsible for garbage removal, the recycling program, road maintenance and snow removal. ***Id.*** *@ ¶15, 630 N.W.2d 574 (Ct.App. 2001).*
>
> Given Mullen's limited duties at the time . . . and the infrequency of spills to which he responds, we are unpersuaded that Mullen's role is sufficiently similar to the role of firefighters and EMT's to justify extending the firefighter's rule to include Mullen. Unlike firefighters and EMT's, Mullen is

> not a professional rescuer who is "specially trained and employed to conduct rescue operations." ***Id.*** *@ ¶16, 630 N.W.2d 574 (Ct.App. 2001), citing* ***Pinter*** *2000 WI 75 @ ¶43, 236 Wis.2d 137, 613 N.W.2d 110. (emphasis added.)*

As was the case in ***Mullen***, the record in our case demonstrates the main function of police officers to be the detection and prevention of crime, as well as the apprehension of criminals, ***P.App.183***; not rescue operations. ***Id.***

Third, there was no emergency. Wisconsin's version of the Firefighter's Rule is unique. It requires the existence of an emergency. ***Pinter,*** *2000 WI 75, ¶ 31, 236 Wis.2d 137, 613 N.W.2d 110.* Missouri's version of the Firefighter's Rule also requires the existence of an emergency. ***Gray v. Russell,*** *853 S.W.2d 928, 931 (Mo.banc 1993).* Missouri has recognized that, where no emergency existed, the Firefighter's Rule was *in*applicable. ***Id.***

Ours is not a case where a police officer was either dispatched or responded to the scene of an emergency. Rather, while on routine patrol Officer Cole happened upon a stray dog and, as a result, took action. No people were in immediate danger, and no one was hurt other than Officer Cole. Even if the Firefighter's Rule should be expanded to police officers, it shouldn't apply in this case.

CONCLUSION

For all the above-stated reasons, Officer Cole requests that this Court reverse the Trial Court's grant of summary judgment in favor of Defendants-Respondents on the basis that public policy is not furthered by expanding the Firefighter's Rule to include police officers. As a result, the Hubanks are not entitled to judgment as a matter of law.

In the alternative, if this Court finds it appropriate to expand the Firefighter's Rule to police officers, then Officer Cole requests this Court reverse the Trial Court's decision, as all of Officer Cole's claims fit within recognized exceptions to the Firefighter's Rule under ***Clark*** and ***Wright*** (i.e., they address allegations of failure to warn and municipal violations which are meant to protect persons such as Officer Cole).

Dated this 30 day of October, 2002.

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)and(c), Stats., for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

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